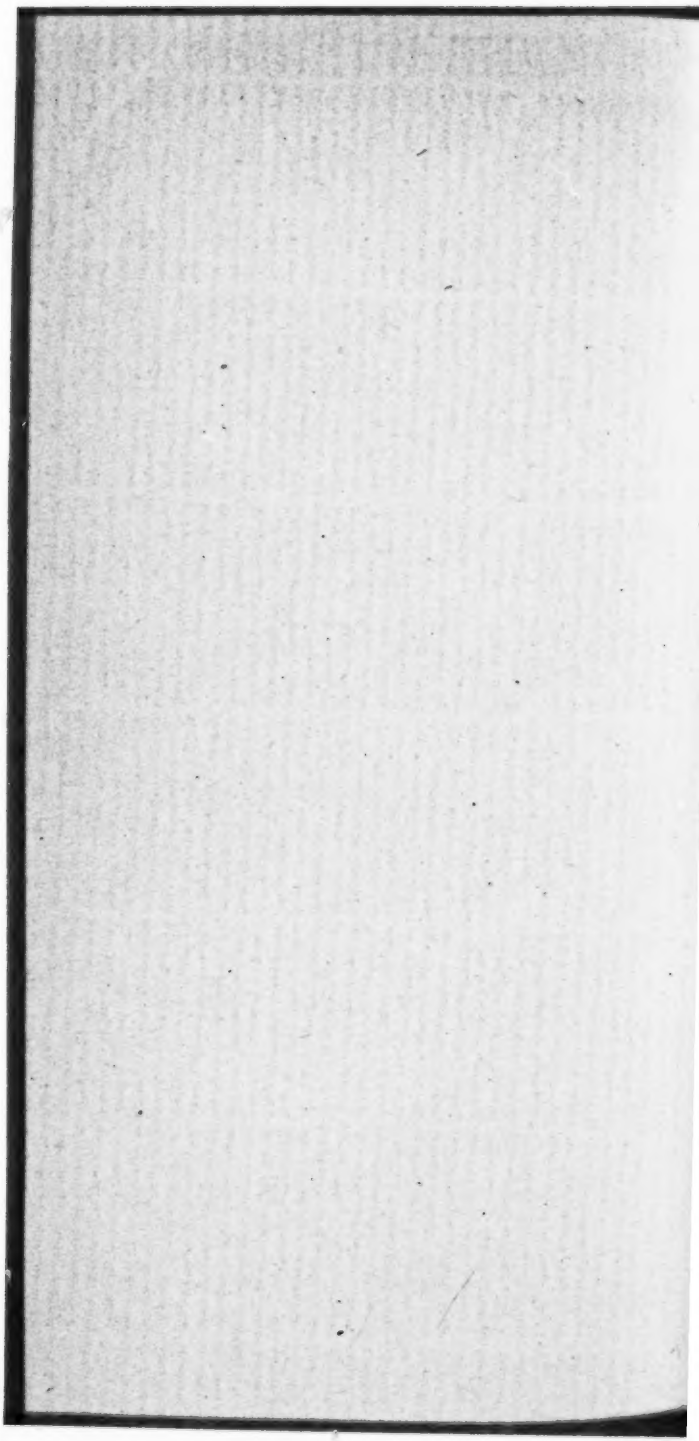

215

Brief of Argument for D.

Filed Oct. 16, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 215.

WILLIAM B. TYLER, *Plaintiff in Error*,

v.

THE JUDGES OF THE COURT OF REGISTRATION.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE DEFENDANTS IN ERROR.

HOSEA M. KNOWLTON,
*Attorney-General.*

FRANKLIN T. HAMMOND,
*Assistant Attorney-General.*

23625

(17,656.)

# Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 213.

WILLIAM B. TYLER, *Plaintiff in Error*,

*v.*

THE JUDGES OF THE COURT OF REGISTRATION.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

## BRIEF FOR THE DEFENDANTS IN ERROR.

HOSEA M. KNOWLTON,
*Attorney-General.*

FRANKLIN T. HAMMOND,
*Assistant Attorney-General.*

23624

# CONTENTS.


| | PAGE |
|---|---|
| BRIEF, . . . . . | 5 |
| APPENDIX A: | |
| LAND REGISTRATION ACT OF MASSACHUSETTS, . . . | i |
| FORMS USED UNDER ACT, . . . . . | xliv |
| INDEX TO ACT, . . . . . | xlix |
| APPENDIX B: | |
| COPIES OF STATUTES, . . . . . | lxi |

23625

# Supreme Court of the United States.

October Term, 1899.

No. 542.

---

William B. Tyler, Plaintiff in Error,

*v.*

The Judges of the Court of Registration.

---

## BRIEF FOR THE DEFENDANTS IN ERROR.

---

### Statement of the Case.

This was a petition for a writ of prohibition brought by the plaintiff in error in the Supreme Judicial Court of Massachusetts, alleging the following facts: —

David E. Gould and George H. Jones on Dec. 22, 1898, applied to the Massachusetts Court of Land Registration to have certain land in Everett, Massachusetts, brought under the operation of the Massachusetts Land Registration Act (St. 1898, c. 562), and to have their title thereto confirmed and registered. The land referred to was shown on a plan filed with the application. The petitioner was the owner of an estate in fee simple adjoining part of the land described in the application, and claimed that the boundary line between his land and the part aforesaid was not correctly shown on the plan filed with the application, but encroached upon and included part of his land. The petition prayed for a writ of prohibition to restrain the respondents, the judges of the Court of Land Registration, from further proceeding upon the application for registration, and alleged that the Land Registration Act under which the proceedings were held violated the provisions of the Constitution of the United

States and of the Constitution of the Commonwealth of Massachusetts in these particulars: —

(1) Because it attempted to deprive persons of their property without due process of law and otherwise than by the law of the land.

(2) Because it purported to give judicial powers to the recorder and assistant recorders therein mentioned, who were not judicial officers appointed and holding their offices as provided in the Constitution of the Commonwealth of Massachusetts in respect to judicial offices.

(3) Because it purported to give to the recorders and assistant recorders powers to deprive persons of their property in registered land without due process of law and otherwise than according to the law of the land.

Upon the petition and answer, together with the rules of the Court of Land Registration and a set of documents referred to in the answer (Record, p. 31), the case was reserved for the full court upon the only question raised at the hearing, — whether the Land Registration Act was constitutional. The full court on Jan. 3, 1900, decided that the act was constitutional, and by final decree, dated Feb. 9, 1900, the petition was dismissed. The case comes here on error to review this decree.

The plaintiff assigns as error that —

(1) The provisions of the Massachusetts Land Registration Act, whereby a decree of registration is made conclusive upon and against all persons as therein provided, are repugnant to the provision of the Fourteenth Amendment, that no state shall deprive any person of property without due process of law, and that

(2) The provisions of said act relating to transfers and dealings with registered land after original registration are repugnant to the said provision of the Fourteenth Amendment.

## Introductory Remarks.

### I.

The necessity for the Commonwealth of Massachusetts of a reform in its laws relating to the transfer of land is forcibly expressed in the following extract from the special message

23626



sent by Governor Russell on Feb. 17, 1891, to the Legislature of Massachusetts: —

"The need of some new system of land transfer is shown by the growing public dissatisfaction caused by the delays and expense attending our present system of registration of deeds. That system has existed in this Commonwealth for a little more than two hundred and fifty years. In former days, when our population was smaller, it apparently satisfied the popular demand; but with increase of population it has become less serviceable. Our people are now largely concentrated in cities and populous towns. The last national census shows that forty-seven cities and towns, having each more than eight thousand inhabitants, contain seventy per cent. of our whole population. The density of the population, with the greater subdivision of land and increase of real estate transactions which it involves, is reflected in the mass of records in our registries of deeds. The four containing the largest number of volumes are those of the Middlesex south district, of Suffolk County, of the Worcester district and of the Essex south district. These contain, respectively, at the present time [1891] 2,022, 1,979, 1,355 and 1,300 volumes.* The increase in the number of volumes in three of these registries during the period of thirty years, from the end of the year 1860 to the end of the year 1890, was as follows: in the Suffolk registry from 790 to 1,974 volumes, an increase of 150 per cent.; in the Middlesex south district registry, from 872 to 2,014 volumes, an increase of 131 per cent.; and in the Essex south district registry, from 617 to 1,297 volumes, an increase of 110 per cent. These figures indicate such a rapid growth in the mass of the records that at no distant day even the question of providing room for the records will be a matter of serious concern. But we are already met by the more serious difficulty, that the present mass of records is so great that much time and labor must be spent in searches in order to ascertain the transactions which affect the title to any piece of land. This causes delay and expense in completing trans-

* On Jan. 1, 1900, there where 2,656 volumes in Suffolk County. See pamphlet by J. T. Hassam on the registers of deeds for the county of Suffolk, in the proceedings of the Massachusetts Historical Society for March, 1900.

fers even if the most complete methods of indexing should be employed, so as to reduce to a minimum the time required in searching the records, and our present methods are by no means perfect. The delay and expense attending the present system form a serious tax upon purchasers and mortgagors of land which bears with special weight upon owners of small estates." *

II.

The statute in question in this case provides for what is commonly known as the Torrens system of registering title to land. The essential features of that system are the following: a judicial proceeding is instituted which ends in a decree declaring who is the owner of the land involved and what other interests, if any, there are in it. Before the decree is entered, however, an examination of the title is made by an official examiner, and notice of the proceedings is given to all persons interested. This decree serves as a declaration or root of title, which is conclusive upon all the world, back of which the courts will not go. The title to the land having been thus *conclusively declared*, it is provided that the usual methods of conveying or dealing with land or raising rights in land by deed or prescription shall not apply to such registered land, so called, but rights therein are to be transferred or created *only by the act of making a public record of such transfer or creation;* and this public record is so kept that the records which relate to one parcel of land are entered upon a single page in the registry book, which page shows, therefore, the actual state of the title at all times. The two chief features of the system are, therefore, (1) a conclusive declaration of the title to land by a decree made after an official examination and notice given to all persons interested, which decree, so to speak, "posts" the title up to date and declares absolutely and as against all the world the only rights which exist in the land, and (2) a change in the method of transfer and creation of rights in registered land, by which rights are transferred or created only by a public registration of the fact.

* See also "Land Transfer; a Reply to Criticisms of the Torrens System," J. R. Carret, 7 Harvard Law Review, 24; "Land Transfer Reform," 4 Harvard Law Review, 271; "Land Title Registration in Massachusetts," W. D. Turner, 33 American Law Review, 42.

23627



Another feature common to most of the Torrens statutes is the provision for an "assurance fund," so called. Each applicant for original registration is required to contribute to a fund which is used to make compensation, if necessary, to any person whose rights may be lost by fraud or mistake in registration. This provision was not contained in the original Torrens acts of England (25 & 26 Vict., cc. 53, 67; 38 & 39 Vict., c. 87), being first enacted in 1897 (60 & 61 Vict., c. 65, §§ 7, 21), and is not an essential feature of the Torrens system. It is contained, however, in the Massachusetts act.

The differences between the Torrens system and the system of registration of deeds which has been in operation in Massachusetts for about two hundred and fifty years are marked.

The object of the system of registering deeds is to give public notice of all instruments affecting the title to land. Conveyances are not valid except as between the parties and persons having actual notice unless they are recorded.* But written instruments constitute only one class of evidence of title. Many facts, such as marriage, death, capacity, execution, delivery, adverse possession, etc., which are outside the record, are essential to a claim of title.† The system of registering deeds does not result in the absolute ascertainment of title. One examining the records can see all the *conveyances* which he need look out for, but he cannot be sure that his title is unimpeachable on grounds arising independent of conveyances. As was said by one of the most eminent conveyancers in England, testifying before the Royal Commission in 1856: "Title by deed can never be demonstrated as an ascertained fact; it can only be presented as an inference more or less probable, deducible from the documentary evidence accessible at the time being."‡ Beside the fact that title can never be absolutely ascertained by examination under a system of registering deeds, there is the further disadvantage that upon each transfer a fresh examination has to be made and the whole ground has to be gone

* Pub. Sts., c. 120, § 4.
† Harvard Law Review, vol. 6, p. 302, and vol. 12, p. 24.
‡ Torrens Title Cases (Toronto), p. xii.

over again. Since there are different degrees of skill among conveyancers, purchasers are usually unwilling to take the opinion of counsel who has made a previous examination, but insist that an examination should be made by their own conveyancer. All these re-examinations involve expense and delay, which are generally needless.

Under the Torrens system not deeds but *titles* are registered. The actual state of the title at the time of original registration is declared with absolute certainty once for all. No re-examination is necessary because subsequent dealings do not take effect until they are noted on the register; and by the mere inspection of this the actual state of the title may be at any time quickly and easily ascertained. While under the system of registering deeds the conveyancer has some of the evidence of title before him and must investigate and form his own conclusion upon the title, under the Torrens system the title is declared with certainty. "In the one case he finds, so to speak, the sum worked out for him; in the other he has the figures given him and he has to work out the sum for himself." *

## III.

A short history of the legislation embodying the Torrens system of land transfer in the various countries where it has been introduced is here given.

### Continental Europe.

Although the system of registering titles embodied in the Massachusetts statute here involved is known to the English speaking world as the "Torrens system," taking its name from Robert Torrens, who first introduced it into Australia, in 1858, it has been in operation in parts of continental Europe for hundreds of years. Registers of ownership have existed from time immemorial in Bohemia. In Vienna, registers of 1368 are still preserved; in Prague, of 1377; in Munich, of 1440. In the Rhine provinces, Hanover and some of the remoter Austrian provinces, the present system of registering title was introduced comparatively recently.

* Report of committee of House of Commons (1878) on Land Titles and Transfers, quoted in Torrens Title Cases (Toronto), p. xxxviii.

23628



Registration of title was made universal in Austria in 1811; it was adopted in Saxony in 1843, in Hungary in 1849–56, and in Prussia in 1872.*

The variety of conditions under which the system is administered is best indicated from the following:*—

"The particular examples collected in the detailed report (accompanying the main report) include, for instance, such great estates as the ancestral domains of the Bohemian nobility (among whom are to be found some of the largest land owners in Europe), subject to the strictest entails, carrying political privileges of the highest importance, and especially registered in immense separate volumes in the provincial capital; they also include (by way of contrast) the tiny subdivisions of the peasant proprietors of the Rhine provinces, where the principles and practices of the Code Napoleon are still deeply rooted in the customs and feelings of the people. They include, on the one hand, specimens taken from the rapidly developing building properties in the suburbs of Berlin, with their villa residences and restrictive covenants, and, on the other, remote Silesian manors, with their tenant farmers, antique rights of common and commuted rents, and services dating from feudal times. They show the system as applied to vast, featureless plains, like the corn-growing regions of Hungary, to the busy mining and industrial districts of Saxony and the Black Country of Germany close to the Russian frontier, as well as to the picturesque Alpine hamlets and pastures, with their innumerable independent rights of way, water and other complicated easements, to be found in Syria and the Saltzkammergut; they pass from the intricacies of cellars and flats, courts and passages, of the Jews' quarter of the city of Prague, to the simple conditions of a quiet agricultural district in Brandenburg; from mortgages on first-class properties involving hundreds of thousands of pounds, and subject to the most complicated subsequent dealings by way of transfer, alteration, subdivision and collateral security, down to rows of petty

* Report of C. Fortescue Brickdale, Esq., assistant registrar of the land registry (England), made to the British government on the system of registration of titles now in operation in Germany and Austria-Hungary, 31 American Law Review, 827.

charges on diminutive shares in an inconsiderable estate; from great cities, where values are measured almost by the square inch, to trackless wastes and bare mountains of scarcely any value at all. Over the whole of this vast and diversified tract, embracing an area more than seven times the size of England and Wales, *systems of registration of title differing in no essential particular from the systems established under the Torrens Acts in Australia, and partially established under the Land Registry Acts in England and Ireland*, have been in almost universal operation for a considerable period, amounting in the principal Austrian provinces to upwards of eighty years, and in certain places dating from a much more remote period."

### Australia.

Robert R. Torrens, a native of England and collector of customs at Adelaide, South Australia, being familiar with the transfer and mortgage of ships under the Merchant Shipping Act of 1854 (17 & 18 Vict. (Imp.), c. 104), conceived the idea of adapting the same system to transactions in land. He devised a scheme for this purpose which was enacted into law in 1858 in South Australia and is the original Torrens Title Act upon which all subsequent legislation of this description is founded.* Through the influence of Torrens the other Australian colonies, Victoria, New South Wales, Queensland, West Australia, Tasmania and New Zealand, quickly followed with similar acts.

The following is a table showing these acts: —

*South Australia.*

1858, 21–22 Vict., No. 15, The Real Property Act.

1858, 21–22 Vict., No. 16, An act to amend the Real Property Act.

1860, 23–24 Vict., No. 11, The Real Property Act of 1860. A consolidation and amendment of the foregoing.

1861, 24–25 Vict., No. 22, The Real Property Act of 1861.

1869–70, 33 Vict., No. 11, An act to amend the Real Property Act of 1861.

---

* 21–22 Vict., No. 15.

23629



1878, 41–42 Vict., No. 128, An act to amend the Real Property Act of 1861.

1881, 44–45 Vict., No. 223, An act to amend the Real Property Act of 1861.

1886, 49 & 50 Vict., No. 380, The Real Property Act of 1886. A consolidation of former acts.

1887, 50 & 51 Vict., No. 403, Amending previous act.

1893, 56 & 57 Vict., No. 569, Real Property Amendment Act, 1893.

*Victoria.*

1862, 25 Vict., No. 140, Real Property Act of 1862. Founded on South Australian Act of 1861.

1866, 29 Vict., No. 301, Transfer of Land Statute.

1867, 31 Vict., No. 317, Transfer of land (amendment).

1869, 33 Vict., No. 353, Transfer of land (dower).

1871, 35 Vict., No. 402, Transfer of land (amendment).

1878, 42 Vict., No. 610, Transfer of land (easement).

1885, 49 Vict., No. 835, Transfer of land (amendment).

1885, 49 Vict., No. 855, Transfer of land (survey boundaries).

1885, 49 Vict., No. 872, Transfer of land (amendment).

1887, 51 Vict., No. 945, Transfer of land (amendment).

1890, 54 Vict., No. 1149, Transfer of Land Act, 1890. Consolidates the prior statutes.

*New South Wales.*

1862, 26 Vict., No. 9, Real Property Act. Founded on South Australian acts, 1858–61.

1873, 36 Vict., No. 7, Amendment to act of 1862.

1878, 41 Vict., No. 18, Amendment to act of 1862.

1893, 56 Vict., No. 16, Conveyancer's Enabling Act.

*Queensland.*

1861–62, 25 Vict., No. 14, Real Property Act. Founded on South Australian act of 1861.

1877, 41 Vict., No. 18, Amending act of 1861–62.

1888, Consolidation of Queensland statutes.

*West Australia.*

1874, 38 Vict., No. 13, Transfer of Land Act.
1878, 42 Vict., No. 15, Amending act of 1874.
1879, 43 Vict., No. 17, Amending act of 1874.

*Tasmania.*

1862, 25 Vict., No. 16, Real Property Act.
1878, 42 Vict., No. 9, Real Property Act, 1878.
1883, 47 Vict., No. 19, Conveyancing and Law of Property Act.

*New Zealand.*

1870, 33–34 Vict., No. 51, Land Transfer Act.
1871, 34 Vict., No. 12, Amending 1870 act.
1874, 37 Vict., No. 15, Amending 1870 act.
1876, 39 Vict., No. 67, Amending 1870 act.
1880, 42 Vict., No. 8, Amending 1870 act.
1883, 46 Vict., No. 32, Amending 1870 act.
1885, 49 Vict., No. 57, Consolidation of prior acts.
1888, 52 Vict., No. 40, Amending 1885 act.
1889, 53 Vict., No. 29, Amending 1885 act.

GREAT BRITAIN.

The first act of this kind in England was Lord Westbury's act, so called.* Simultaneously the Declaration of Titles Act was passed,† and in 1865 "An act for the recording of titles in Ireland."‡

In 1875 the Land Transfer Act (Lord Cairn's act) was passed.§ In 1891, 54 & 55 Vict., c. 66, was passed, entitled "An act to establish local registries of titles to land in Ireland"; and in 1897 an act amendatory of the Land Transfer Act was passed.‖ Lord Cairn's act made the registration of title to land optional but not compulsory; but by 60 & 61 Vict., c. 65 (1897), it is provided that by order in council, to be published in the "London Gazette," the Queen

* 25 & 26 Vict., c. 53 (1862).
† 25 & 26 Vict., c. 67 (1862).
‡ 28 & 29 Vict., c. 88.
§ 38 & 39 Vict., c. 87.
‖ 60 & 61 Vict., c. 65.

23630



may declare that as to any county or part of a county registration of title to land is to be compulsory on sale, and in that case the title shall not pass until the transferee is registered as the proprietor of the land (§ 20). Under this provision compulsory registration has been extended to the county of London.* The original act of 1875 did not provide for any indemnity. The act of 1897 supplied this feature (§ 7).

### Canada.

In British Columbia the Torrens system was introduced in 1870 (33 Vict., No. 17), although its principles were adopted in that section known as Vancouver Island as early as 1861.†

Various amendments have been made to this act.‡

In Ontario in 1885 the Land Titles Act was passed, founded on Lord Cairn's act. The following amendments have been made: 50 Vict., cc. 14, 15, 16; 51 Vict., c. 12, § 5; 52 Vict., c. 20; 53 Vict., c. 32; 55 Vict., c. 24; 56 Vict., cc. 22, 23; 58 Vict., c. 13, § 31.

In Manitoba the first statute enacting the Torrens system was 48 Vict., c. 28 (1885). This act was amended and the amending acts consolidated. (Revised Statutes of Manitoba, c. 133; 57 Vict., c. 30.)

### United States.

In Illinois, a Torrens act was first passed in 1895 (L. of 1895, p. 107), but was held unconstitutional in *People* v. *Chase*, 165 Ill. 527. In 1897 another statute was passed, on the same subject (L. of 1897, p. 141), the constitutionality of which was upheld in *People* v. *Simon*, 176 Ill. 165.

In Ohio, an act was passed in 1896 intended to introduce the Torrens system (92 Ohio Laws, 220). This act was held unconstitutional in *State* v. *Guilbert*, 56 Ohio St. 575.

In California, a Torrens act was passed in 1897 (Sts. 1897, c. 110). It has not been the subject of any judicial decision.

In Massachusetts, the Torrens system was first dealt with

---

* "London Gazette," July 19, 1898, and Dec. 5, 1899.

† Report answering the Earl of Kimberly, British Blue Book (1881), vol. 64.

‡ 42 Vict., c. 22; 47 Vict., c. 17; 51 Vict., c. 17; 35 Vict., c. 31; 48 Vict., c. 17; Consolidated Acts, 1888, c. 67; 36 Vict., No. 21; 50 Vict., c. 18; 53 Vict., cc. 24, 25; 54 Vict., c. 16; 55 Vict., c. 26; 56 Vict., c. 23.

officially in 1891 by the late Gov. William E. Russell in his inaugural address, and afterwards in a special message to the Legislature, recommending the appointment of a special commission to investigate the subject and report a draft of an act. A joint special recess committee was thereupon appointed, which reported in favor of the adoption of the system. A draft of a bill was before the Legislatures of 1892 and 1893, and in the latter year a special commission was provided for by statute, in accordance with the recommendation of Governor Russell. Three prominent members of the bar were appointed commissioners. In March, 1894, they reported to the Legislature a majority and minority draft for a bill. Neither draft was enacted and the matter was referred to each succeeding Legislature until 1897, when by chapter 511 of the Acts of 1897 the governor was authorized to appoint a committee to draft another bill. Alfred Hemenway, Esq., of Boston was appointed sole commissioner, and on Jan. 3, 1898, he reported a draft of a bill to the Legislature which, with slight changes, was enacted as St. 1898, c. 562, entitled "An act to provide for registering and confirming titles to land." This act was amended by St. 1899, cc. 125, 131, and St. 1900, c. 354, and with such amendments is printed in full below.

## IV.

The following is an outline of the provisions of the Massachusetts Land Registration Act: —

A court known as the Court of Land Registration is established (§ 2). An owner of land may apply to this court to have his land registered, and the title thereto confirmed (§ 19), accompanying his application with a plan of the land (§ 26), and thereupon the application is referred to an official examiner of titles, who searches the records and files a report stating his opinion upon the title (§ 30). Notice of the application is then given by order of the court by publication, mailing by registered letter and posting on the land, and in such other manner as the court may order (§ 32); and a notice of the application is recorded in the registry of deeds (§ 20). Proof of actual notice is required where possible

(§ 32). On the return day stated in the notice a guardian *ad litem* may be appointed for minors and all persons not in being, unascertained, unknown, or out of the Commonwealth (§ 33), and if no person appears, the court may order a general default, and may make a decree confirming the title and ordering it to be registered (§ 35). The decree describes the land and states the estate of the owner, and all incumbrances in the order of their priority (§ 40). This decree operates directly upon and binds the land and is conclusive upon all persons, including the Commonwealth, and is the basis for all subsequent dealing with the land (§ 38). A certified copy of the decree is transcribed into a record book, and is known as the original certificate of title (§ 41). An exact duplicate of this original certificate is given to the owner of the land, and is known as the owner's duplicate certificate (§ 41). The land thus becomes registered land. The owner of registered land holds it free from all incumbrances, except those stated on the certificate, and certain others enumerated in the act, not material to the questions raised (§ 39), and the original certificate in the registration book, or an attested copy, or the owner's duplicate certificate, is made evidence and conclusive of all matters contained therein in the courts of the Commonwealth (§ 47).

After land is registered it may be conveyed, mortgaged, leased, charged or otherwise dealt with as fully as though it were not registered (§ 50). The fee is conveyed in the following manner. The grantor makes an ordinary deed of conveyance, which he or the grantee presents, together with the grantor's duplicate certificate, to an official called the assistant recorder. The duplicate certificate is surrendered and stamped "cancelled." The deed of conveyance is filed with the assistant recorder, a new certificate of title is made out in the registration book to the grantee, and a new owner's duplicate certificate delivered to the grantee, which is conclusive as to the title in like manner as the original certificate. Incumbrances appearing on the old certificate are transferred and stated on the new (§§ 57–59).

Interests in registered land, less than estates in fee created voluntarily by the owner, are conveyed by making out forms of instruments now used (deeds, mortgages, leases, etc.).

These instruments are then filed with the assistant recorder, and a memorandum thereof is made on the original certificate, and a similar memorandum on the owner's duplicate, which is presented, and the memorandum is binding upon the registered owner and all persons claiming under him. No voluntary instrument takes effect as a conveyance, or binds the land, until registered (§§ 60, 61, 64).

Liens, claims and other dealings relating to registered land do not affect the title until such dealings are registered; and provision is made for registering attachments, claims for liens and other instruments and dealings intended to affect the title to registered land (§§ 71, 77).

On the death of a registered owner, upon application by his heirs-at-law or devisees, and upon notice and hearing, the court may direct the entry of a new certificate of title to the heirs or devisees, with a memorandum stating that the estate is in process of settlement; which memorandum, after notice and hearing on the petition, may be cancelled after the time for bringing actions against the estate has expired (§ 92).

On original registration, and on registration by descent or devise, one-tenth of one per cent. of the assessed value of the property at the last assessment is paid into the treasury of the Commonwealth. Money so paid is to be kept as an assurance fund by the treasurer, from which compensation may be recovered by a person sustaining loss or damage without his own negligence by the registration of interests in land through fraud, or in consequence of error in the certificate of title or memorandum (§§ 94–103).

## Argument.

### *First Assignment of Error.*

The point taken by the first assignment in error is that the provisions of the statute relating to proceedings for initial registration of title are unconstitutional because they provide for depriving persons of property without due process of law (Record, p. 31).

23632



I.

It has been settled beyond all controversy by decisions of this court that as to land within its limits the government of a state has exclusive power to regulate the tenure, the method of acquisition and transfer, the law of its descent and the extent of the right of testamentary disposition. As to the right of a state to provide means for ascertaining the title to land within its limits this court, speaking through Mr. Justice Brewer, said in *Arndt* v. *Griggs*, 134 U. S. 316, 321: "The well-being of every community requires that the title of real estate therein shall be secure, and that there be *convenient and certain methods of determining any unsettled questions respecting it.* The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the state; and as this duty is one of the state the manner of discharging it must be determined by the state, and *no proceeding which it provides can be declared invalid unless in conflict with some special inhibitions of the Constitution or against natural justice.*"

*United States* v. *Fox*, 94 U. S. 315, 320.
*Langdon* v. *Sherwood*, 124 U. S. 74, 81.
*Arndt* v. *Griggs*, 134 U. S. 316.
*Lynch* v. *Murphy*, 161 U. S. 247.
*Hamilton* v. *Brown*, 161 U. S. 256, 275.
*Wehrman* v. *Conklin*, 155 U. S. 314, 331.

The present act was passed in the exercise of this power of the Legislature relating to land within its limits, and hence subject to its jurisdiction. The proceedings which the act authorizes end in a decree determining, declaring and ordering the registration of the title to land, and the act provides new rules regulating the tenure, method of transfer, descent and disposition by will of registered land.

The right of the state to deal with the subject-matter involved being clear, it remains to consider whether the mode of proceeding in the initial registration of titles under this act is "in conflict with some special inhibitions of the Constitution or against natural justice;" or, in other words, is "due process of law."

## II.

### *Due Process of Law.*

"A perfectly satisfactory definition of due process may perhaps not be easily stated," Mr. Justice Brewer in *Brown* v. *New Jersey*, 175 U. S. 172, 176.

In *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, 563, the court said, speaking through Mr. Justice McKenna: "What it is for a state to deprive a person of life, liberty or property without due process of law" is not much nearer to precise definition to-day [1899] than it was said to be by Mr. Justice Miller in *Davidson* v. *New Orleans*, 96 U. S. 97. The difficulty of definition is inherent (*Freeland* v. *Williams*, 131 U. S. 405, 418). Whether process of law is *due* process depends upon so many considerations that it is impossible to make a definition that will serve as a test for all cases. Attempts at definition when made even by this court have had to be qualified. The method applied in *Murray's Lessee* v. *Hoboken*, 18 How. 272, 276–7 (1855), of determining the question of due process by reference to and comparison with settled usages and modes of proceeding existing in England and brought to this country by our ancestors, has not been held to be the only method to be followed.

*Hurtado* v. *California*, 110 U. S. 516.
*Maxwell* v. *Dow*, 176 U. S. 581.

Settled usages and modes of procedure may be changed (*Hallinger* v. *Davis*, 146 U. S. 314, 321).

"Any legal proceeding enforced by public authority, whether sanctioned by age and custom or *newly devised* in the discretion of the legislative power, in furtherance of the general public good, which regards these principles of liberty and justice, must be held to be due process of law." Mr. Justice Matthews in *Hurtado* v. *California*, 110 U. S. 516, 537.

This court, speaking through Mr. Justice Brown in *Holden* v. *Hardy*, 169 U. S. 366, in an exhaustive opinion reviewing all the cases bearing on due process of law, points

out that it has not "failed to recognize the fact that the law is, to a certain extent, a progressive science;" that in some states methods of procedure formerly thought to be essential for the protection of life, liberty and property have been changed; that, for example, special pleading, ancient tenures of real estate and grand juries have been abolished, and indictments have been simplified; that "while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation;" and that the Constitution of the United States "should not be so construed as to deprive the states of the power to amend their laws so as to make them conform to the wishes of the citizens, as they may deem best for the public welfare, without bringing them into conflict with the supreme law of the land."

An examination of the decisions of this court shows that, in discussing the meaning of the phrase "due process of law," the court has repeatedly referred to the purpose for which the equivalent and parent phrase "the law of the land" was inserted in Magna Charta as the best indication of its true meaning. That purpose has been frequently declared to have been to secure the subject against the *arbitrary action* of the king, and to place him under the protection of the law.

*Missouri Pacific R.R. Co.* v. *Humes*, 115 U. S. 512.
*Dent* v. *West Virginia*, 129 U. S. 114.
*Hurtado* v. *California*, 110 U. S. 516.
*Davidson* v. *New Orleans*, 96 U. S. 97.

In England this phrase in Magna Charta was not intended as a limitation on the power of Parliament, but in this country the equivalent phrase "due process of law" is a restraint on all the powers of government, legislative as well as executive and judicial.

*Murray's Lessee* v. *Hoboken*, 18 How. 272.

It is repeatedly asserted, in the decisions of this court, that the phrase "due process of law" in the Fifth and Fourteenth Amendments is intended to secure the citizen

in his person and property against the *arbitrary exercise of the powers of government unrestrained by the immutable principles of natural justice.* And this is probably as complete a definition of the phrase as can be given.

*Holden* v. *Hardy*, 169 U. S. 366.
*Davidson* v. *New Orleans*, 96 U. S. 97, 107.
*Bank of Columbia* v. *Okely*, 4 Wheat. 235.
*Caldwell* v. *Texas*, 137 U. S. 692, 697.
*Hodgson* v. *Vermont*, 168 U. S. 262.
*Fong Yue Ting* v. *United States*, 149 U. S. 698, 763.
*Jones* v. *Brim*, 165 U. S. 180, 182.
*Hurtado* v. *California*, 110 U. S. 516.
*Dent* v. *West Virginia*, 129 U. S. 114.
*Missouri Pacific R.R. Co.* v. *Humes*, 115 U. S. 512.
*Leeper* v. *Texas*, 139 U. S. 462, 468.

The words "due process of law" do not guarantee any "particular *forms of procedure*, but the very *substance* of individual rights to life, liberty and property."

*Hurtado* v. *California*, 110 U. S. 516.
*Louisville & Nashville R.R.* v. *Schmidt*, 177 U. S. 230, 236.
*Kennard* v. *Louisiana*, 92 U. S. 480.

In every case, therefore, when it has become necessary to consider whether a statute provides "due process of law," the court has considered the subject-matter dealt with, the purpose for which the statute was passed, and all other matters bearing on the question, whether the statute was arbitrary, oppressive or partial in its application. The following are examples of such cases: —

*Missouri Pacific R.R. Co.* v. *Nebraska*, 164 U. S. 403.
*Chicago, etc., R.R.* v. *Minnesota*, 134 U. S. 418.
*King* v. *Mullins*, 171 U. S. 404.
*Missouri Pacific R.R. Co.* v. *Humes*, 115 U. S. 512.

*Lawton* v. *Steele*, 152 U. S. 133.
*Wilson* v. *North Carolina*, 169 U. S. 586.
*Holden* v. *Hardy*, 169 U. S. 366.
*Turner* v. *New York*, 168 U. S. 90.
*Kennard* v. *Louisiana*, 92 U. S. 480.
*Gulf, etc., R.R.* v. *Ellis*, 165 U. S. 150.

*Proceedings under Tax Statutes.*

Statutes passed in the exercise of the taxing power are valid if they provide for notice by publication to the owner of property taxed, and give him a right to be heard at some stage of the proceeding upon the question of the fairness of the tax assessed. *Ex necessitate* the proceedings are less formal than in judicial proceedings.

*Spencer* v. *Merchant*, 125 U. S. 345.
*Walston* v. *Nevin*, 128 U. S. 578.
*Palmer* v. *McMahon*, 133 U. S. 660.
*McMillen* v. *Anderson*, 95 U. S. 37.
*Lent* v. *Tillson*, 140 U. S. 316, 327.
*Hagar* v. *Reclamation District*, 111 U. S. 701.
*Bauman* v. *Ross*, 167 U. S. 548, 590.
*Paulsen* v. *Portland*, 149 U. S. 30–40.
*Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112.

*Proceedings under the Power of Eminent Domain.*

A statute authorized the appointment of commissioners to take land for a railroad and assess damages therefor. Before acting, the commissioners were to give notice by publication. The commissioners gave notice by publication addressed generally to all persons owning land on the line of the railroad, "as the same is now or may be located, through section 23, township 11, range 25, in the county of Wyandotte and state of Kansas." The notice stated that the commissioners would on a certain day proceed to locate the road through that section and *assess damages for land taken.*

The court held that the statute was constitutional, and that the proceedings constituted "due process of law," the statute *going upon the necessity of the case, and upon the reasonable*

*presumption that, since all the parties could not be served personally with notice, the publication which was designed to meet the eyes of everybody was to stand for such notice.*

*Huling* v. *Kaw Valley Ry. Co.*, 130 U. S. 559.

*Statutes passed in the Exercise of the Police Power.*

In considering the validity of statutes passed in the exercise of the police power, the inquiry always is whether the provisions of the statute are designed to meet some reasonable public purpose in a reasonable manner. Statutes have been sustained which direct the abolition of grade crossings at the expense of railroad companies (*N. Y. & N. E. R.R. Co.* v. *Bristol*, 151 U. S. 556); making railroads liable in double damages for losses occasioned through failure to erect fences (*Missouri Pacific Ry. Co.* v. *Humes*, 115 U. S. 512); depriving railway companies of the defence of contributory negligence in respect to injuries received by employees and of the right to contract for exemption from liability for negligence (*Missouri Ry. Co.* v. *Mackey*, 127 U. S. 205, 209); requiring railroad employees to be examined as to their eyes, and the company to pay for the expenses of the examination (*Nashville, etc., Ry.* v. *Alabama*, 128 U. S. 96); making railroad companies responsible in damages for all property set on fire by their engines, whether directly or indirectly, and irrespective of negligence (*St. Louis, etc., Ry.* v. *Mathews*, 165 U. S. 1, 5); limiting the hours of employment in occupations injurious to health (*Holden* v. *Hardy*, 169 U. S. 366).

Where legislation of this character, however, is based upon classifications which are arbitrary, unreasonable and oppressive it is not due process.

*Gulf, etc., Ry.* v. *Ellis*, 165 U. S. 150.

*Statutes providing Methods of Legal Procedure.*

In matters of procedure, as in other cases, due process law depends upon the nature of the proceeding as well as of the object of the law. It is only when, under the guise of legal procedure, the fundamental rights of the individual are invaded, that relief can be properly sought under the

Fourteenth Amendment. That procedure constitutes due process of law which is *reasonably suitable to the nature of the case.*

*Kennard* v. *Louisiana*, 92 U. S. 480.
*Hagar* v. *Reclamation District*, 111 U. S. 701.
*Ex parte Wall*, 107 U. S. 265, 289.

A striking illustration of the general proposition that due process depends upon the subject-matter of a statute is

*Lawton* v. *Steele*, 152 U. S. 133.

In that case a state statute was held valid that forbade fishing other than by hook and line, and authorized the *summary destruction by any person* of any net, pound or other means for taking fish used in violation of the act. It was said that the state had the power to protect the fisheries, and might authorize judicial proceedings for condemnation and forfeiture, and where the property was of little value and its use for illegal purposes clear the legislature might subject it to summary abatement; and that in drawing the line between cases where property might be summarily destroyed and where it must be judicially condemned, value was a consideration, as also was the comparative cost of judicially condemning such property and the value of the property itself.

So the test of the validity of a limitation statute is whether, taking all the circumstances into consideration, the statute allows a reasonable time for the commencement of suits.

*Wheeler* v. *Jackson*, 137 U. S. 245, 258.
*Barrett* v. *Holmes*, 102 U. S. 651, 658.
*Campbell* v. *Holt*, 115 U. S. 620.
*Turner* v. *New York*, 168 U. S. 90.

"The Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these pur-

poses *gives reasonable notice* and *affords fair opportunity* *be heard* before the issues are decided."

*White, J., in Iowa Central R.R.* v. *Iowa*, 1
U. S. 389–393.
*Hurtado* v. *California*, 110 U. S. 516.

From this examination of the authorities may be deduc the general principle that a state statute providing for method of procedure for determining, establishing and d claring the title to land within the state, and for the entry a decree affecting such land by changing the mode of i acquisition and transfer, is valid as constituting due proce of law so far as notice is concerned, if, taking into conside ation the subject-matter, the purpose of the statute, and th mode of proceeding, the statute provides for reasonab notice and affords fair opportunity to be heard. What " reasonable notice" and what is a "fair opportunity" wi be discussed hereafter.

III.

The provisions of the act relating to initial registratio are here set forth in detail.

Application for registration of title may be made to th Court of Land Registration by the person or persons claim ing to own the land in fee or to have the power of appointin or disposing of the land in fee (§ 19). The application i to be in writing, signed and sworn to by the applicant or b his authorized attorney. It must contain an accurate de scription of the land, must state whether the applicant i married, and if married give the name of the wife or hus band; if unmarried, whether he or she has been married and if so when and how the marriage relation terminated (i by divorce when, where and by what court the divorce wa granted). It must state the name in full and the address o the applicant, and also the names and addresses of the owners and occupants of adjoining land, so far as known, and if not known it must state what search has been made t find them. It must set forth clearly all other outstanding estates or interests known to the petitioner and all claims of interest set up, whether admitted or denied (statute so con-

strued by the state court, Record p. 33), and the name, place of residence and post-office address of the occupant, if there is one, and the nature of his occupancy (§ 21). The court may by rule require additional facts to be stated (§ 28). Making a false statement in the application is declared to be perjury and is punishable as such (§ 112).

The applicant is to file with his application a plan of the land and all original muniments of title within his control (§ 26).

Upon the filing of the application a memorandum thereof containing a copy of the description of the land concerned is to be filed at once in the registry of deeds, which memorandum is to be recorded and indexed with the records of deeds (§ 20). The case is immediately referred to one of the official examiners (attorneys at law appointed by the judge, § 12), who searches the records and investigates all facts stated in the application or otherwise brought to his notice and reports his opinion of the title (§ 30). If the examiner is of opinion that the applicant has a good title as alleged, or if the applicant after an adverse report by the examiner elects to proceed, the recorder is required immediately upon the filing of the examiner's opinion, or the applicant's election, to publish a notice by order of the court in some newspaper published in the district where any portion of the land lies. This notice is to be addressed by name to all persons known to have any adverse interest or claim, whether admitted or denied, and to the adjoining owners and occupants so far as known, and "to all whom it may concern." It is to contain a description of the land, the name of the applicant and the time and place of the hearing (§ 31). The return day of the notice is to be not less than twenty nor more than sixty days from the date of issue (§ 32). Within seven days after publication the court is to cause a copy of the notice to be mailed to every person named in the notice whose address is known, and also a duly attested copy to be posted by a sheriff or deputy sheriff in a conspicuous place on each parcel of land included in the application fourteen days at least before the return day (§ 32). The court, so far as it deems it possible, is to require proof of *actual notice to all adjoining owners and to all persons who*

*appear to have any interest in or claim to the land*, and notice to such persons by mail must be by registered mail (§ 32, as amended by St. 1900, c. 354, § 5). The court may also cause other or further notice to be given in such manner and to such persons as it may deem proper (§ 32), and it may appoint a guardian *ad litem* for minors, and for all persons not in being, unascertained, unknown or out of the Commonwealth who may have an interest (§ 33, as amended by St. 1899, c. 131, § 6).

Any person, whether named in the notice or not, may appear and object to the application (§ 34). If no person appears and objects on or before the return day, or within such further time as may be allowed by the court, the court may order a general default, which concludes all the world, and may make a decree thereon (§ 35). Before decree the court may order a survey to determine boundaries and may order durable bounds to be set (§ 36).

If an appearance and objection is entered a default is first to be taken against all who do not appear, and the case is then heard on the objection made either by the court or by reference to a master (§ 36). If the court finds that the applicant has not title proper for registration, the application is dismissed (§ 37); but instead of dismissing an application the court may allow proper parties to be joined or substituted and may make a decree declaring the title to be in them (§ 23). If it finds that the applicant has title proper for registration it enters a decree of confirmation and registration (§ 38), which describes the land as finally determined and sets forth the estate of the owner and all particular estates, encumbrances and interests to which the land is subject (§ 40).

The decree binds the land and quiets the title subject only to the exception of certain enumerated rights (§ 39), and is conclusive upon and against all persons, including the Commonwealth, whether mentioned by name in the application, notice or citation, or included in the general description "to all whom it may concern". Such decree is not to be opened by reason of the absence, infancy or other disability of any person affected thereby, nor by any proceeding at law or in equity for reversing judgments or decrees; subject,

however, to the right of any person deprived of land or of any estate or interest therein by a decree of registration obtained by fraud to file a petition for review within one year after the entry of the decree, provided no innocent purchaser for value has acquired an interest (§ 38).

A right of appeal from the decree of registration is given, the appeal to be taken within thirty days of the date of the decree (§ 14).

IV.

The plaintiff in error argues that the provisions for initial registration are invalid because

(1) Persons named in the notice and residents of the state may not constitutionally be barred by such proceedings unless they are served with process in the way usual in ordinary suits *in personam;* and

(2) Persons unknown and not named, except generally by the words "to all whom it may concern," may not constitutionally be barred by such proceedings at all.

The objections may best be considered together.

There are two answers to these objections either one of which, it is contended, is sufficient to dispose of them. The first answer is that the proceedings for initial registration are strictly proceedings *in rem*, and the notice prescribed is sufficient, publication of notice alone being all that is required in proceedings *in rem*. This is the answer which Mr. Chief Justice Holmes makes. But it is apparent that it is unnecessary to the decision of this case to classify these proceedings at all, because the act provides for other means of notice besides publication. The four other judges (excepting the two dissenting judges) preferred, therefore, to answer the objections raised by *assuming* that "in cases in which, under the constitutional requirements of due process of law, it heretofore has been necessary to give to parties interested actual notice of the pending proceeding by personal service or its equivalent in order to render a valid judgment against them, it is not in the power of the Legislature, by changing the form of the proceeding from an action *in personam* to a suit *in rem*, to avoid the necessity of giving such a notice," and by *assuming* that "under this statute personal rights in

property are so involved and may be so affected that effectual notice and an opportunity to be heard should be given to all claimants who are known or who by reasonable effort can be ascertained" (Record, p. 37), and by deciding that this act makes provision for giving such effectual notice and opportunity to be heard.

In considering the first answer to these objections it is well to bear in mind what the precise inquiry is. It cannot be denied that the intent of the Legislature to provide that the proceedings for initial registration should be treated and considered as proceedings *in rem*, is expressly declared and is clear. "The proceedings upon such application shall be proceedings *in rem* against the land, and the decree shall operate directly on the land and vest and establish title thereto" (§ 2, as amended; see also §§ 35, 38). The real question, therefore, in this connection is: Does the Fourteenth Amendment prevent a state from treating a proceeding for determining and declaring the title to land within its limits as a proceeding *in rem* and from providing for the form of notice characteristic of such proceedings? (See *Arndt* v. *Griggs*, 134 U. S. 316, 319, 320.)

Mr. Justice Loring argues that the Federal Constitution does have this effect. His argument briefly stated is that there have been only certain proceedings *in rem* known to the common and statute law; that no such proceeding was ever known to that law the purpose of which was merely to enforce a claim of title to property; that the Legislature cannot create any new proceeding *in rem* except one which has the characteristics said by him to be common to all proceedings *in rem;* and these characteristics he defines by describing a proceeding *in rem* as one in which property alone is proceeded against as a defendant responsible for certain claims.

The test of a proceeding *in rem* he states as follows: "Is it a proceeding to enforce a liability for which the *res* is liable, irrespective of who owns it, — such a liability that the *res* can be properly impleaded as the respondent who is liable? If it is, it is a proceeding *in rem*, otherwise not, and the Legislature cannot make it a proceeding *in rem*." (Record, p. 52.)

But what reasons does he give for saying that the Legislature is bound by this supposed constitutional limitation? What fundamental principles of natural justice justify a proceeding *in rem* to enforce a claim for tort or for wages against all interests in a vessel, but forbid a claim of title being enforced in the same way? Why do such principles allow a non-resident's land to be sold on a judgment obtained in a suit of which he has notice only by publication (which may not be actual notice at all); and allow also a non-resident's claim of title to be barred in the same way (*Arndt* v. *Griggs*, *supra*), but forbid a suit to establish a claim of title being treated as a proceeding *in rem*, except as to non-residents? His reasons are not expressly given but are apparently to be implied from his definition of the essence of a proceeding *in rem*.

The learned judge says, in effect, the fundamental principles of natural justice are not violated because in a true proceeding *in rem* the defendant is not a person but property which is properly held liable for certain claims, and the remarks of Mr. Justice Field in *Freeman* v. *Alderson*, 119 U. S. 185, 187, are cited to the effect that a suit *in rem* is a proceeding against property alone "treated as responsible" for certain claims.

But that this is a mere fiction is apparent from the words cited from the opinion in *Freeman* v. *Alderson*. The property is merely "treated" as responsible. It is not and cannot be *natura rerum* "responsible" for anything; and an argument based on a pure fiction can have no weight where realities and fundamental rights are concerned. When such fundamental rights have been in danger of denial if the fiction were treated as a reality, this court has gone behind the fiction and regarded a proceeding *in rem* as in substance against persons, and has decided accordingly.

In *Boyd* v. *United States*, 116 U. S. 616, a statute was examined which authorized the court in revenue cases to compel a defendant or claimant to produce any paper tending to prove the government's case. It was held repugnant to the Fifth Amendment, as applied to suits *in rem*, to establish a forfeiture of goods. In a prior decision by a United States Circuit Court judge (*United States* v. *Mason*, 6 Bis-

sell, 350) the statute had been held constitutional on the ground that the proceeding being *in rem* was not against persons but against property, and that therefore the act did not require the claimants to furnish evidence against *themselves* contrary to the Fifth Amendment. The court, however, refused to assent to this proposition, declaring that the proceeding was in effect a proceeding against the owner, and said (p. 637): "In the words of a great judge, 'Goods as goods cannot offend, forfeit, unload, pay duties, or the like, but men whose goods they are'" (Vaughan, C.J., in *Sheppard* v. *Gosnold*, Vaugh. 159, 172); and again (p. 638): "although the owner of goods sought to be forfeited by a proceeding *in rem* is not the nominal party, he is nevertheless the substantial party to the suit." To *treat* property as alone responsible for claims, and dispose of it by a judicial proceeding without taking any steps to notify the owners whose rights are affected, may work a denial of fundamental rights quite as completely as if the owners were treated as parties.

Nor does the distinction taken by the learned judge that the only claims enforceable by proceedings *in rem* are those for which the *res may be properly treated as liable* tend to throw much light on the main question. Why is a claim for wages, or for a tort committed by the master of a ship, a claim for which you may *properly* treat the ship as a defendant? What are the criteria for judging the propriety of applying the fiction to such a case? Does the Constitution (as we should imply that the learned judge thought) permit the title to land to be cleared by enforcing a mechanic's lien against all interests in it by strict proceedings *in rem* merely because the land may be "properly impleaded as the respondent who is liable"? If so, why should not a claim of ownership in fee be enforceable in the same way?

Is seizure of the *res* to be considered as essential to a proceeding *in rem?* The object of seizure in such a proceeding is to keep the property within the control of the court so that its judgment may be enforced. If the judgment may be enforced without seizure, it is unnecessary.

*Roller* v. *Holly*, 176 U. S. 398, 406.

And if the property is immovable, seizure is unnecessary and superfluous.

23639



As a means of notice, seizure may be wholly inadequate, for it may be purely formal, as, for instance, in the case of an attachment of real estate which is made by depositing in the registry of deeds a copy of the writ (Pub. Sts., c. 161, §§ 61–66), or the seizure of a ship in a libel *in rem* in admiralty, which is effected by affixing a copy of the warrant to the mast of the ship. It was not essential in either proceeding that possession should be retained by the officer making the seizure (2 Browne's Civil & Admiralty Law, pp. 398–9).

Whether or not actual seizure of property other than personal is essential, it is certain that jurisdiction in a proceeding *in rem* may be acquired by *acts of equivalent import*. As this court said, through Mr. Justice Miller in *Cooper* v. *Reynolds*, 10 Wall. 308, 317: "While the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. Among this latter class is the levy of a writ of attachment or seizure of real estate which, being incapable of removal, and lying within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact to the court." The immediate filing of the notice of *lis pendens* in the registry of deeds (§ 20), and the posting of a copy of the notice on the land by the sheriff or his deputy, is an "act of equivalent import" within the meaning of the opinion in the above case.

What, then, is the true justification for holding that the state has the power to declare that proceedings like those provided for by this statute may be treated as *in rem*? It is submitted that it lies in the reasonable requirements of justice.

In suits against non-residents served with notice only by publication, property within the jurisdiction may be held responsible for the claim sued on. In suits against a non-resident, to declare title to land within the jurisdiction, notice by publication is sufficient (*Arndt* v. *Griggs*, 134 U. S.

316). In suits to foreclose a mortgage or enforce a mechanic's lien upon land in the state, the same is true (*Roller* v. *Holly*, 176 U. S. 398). In a libel *in rem* in admiralty a judgment may be entered affecting the property within the control of the court, without notice other than by publication. The essential element that is common to all these actions is not that of seizure or personification of the property as a defendant, but it is this: that the property is subject to the control of the court and that the reasonable requirements of justice demand that it should be affected or disposed of without other regard to the rights of the persons interested than that notice of the proceedings in some reasonable form should be sent to them. In attachment proceedings against non-residents justice demands it because it is fair that their property within the state should be held to pay their just debts. In suits to declare title or to enforce a mortgage justice demands it because otherwise a state would be powerless to settle title to or enforce a lien upon its own land. This is precisely the ground upon which the statutes allowing service by publication were held valid in *Arndt* v. *Griggs*, *Hamilton* v. *Brown*, and *Short* v. *Caldwell*, stated below. And it is the ground upon which rest those numerous statutes printed in the appendix providing for notice to unknown persons by publication.

Now, it would be difficult to think of a judicial proceeding to which the requirements of justice more plainly demanded the application of the rules relating to proceedings *in rem* than the proceedings for initial registration under this act. The land, the title to which is sought to be declared, is absolutely within the control of the state. Nay, even, the land *is* the state. Absolute certainty of title is of the utmost importance to the public welfare, so much so, indeed, that it has even been proposed that merely to clear titles the state might take all the land within its limits by right of eminent domain. Absolute certainty against unknown claims, as against claims of non-residents, can be secured only by treating the proceeding as a proceeding *in rem*. The necessity is as great in the case of unknown claimants as in the case of non-resident claimants or of persons unascertained or not

in being. And the fundamental requirements of justice are equal in all three cases.

It is said, however, by Mr. Justice Loring, that this proceeding is not an action *in rem* like certain probate or bankruptcy proceedings, the object of which is to find an owner for property *in gremio legis*, but is merely an action to enforce a personal right in property. We say, however, that this *is*, simply and solely, an action to find and determine the owner for property, property which is *in gremio legis*, just as much as the estate of a bankrupt or the estate of a dead man. If the state, through its probate court, can dispose of the real estate of a dead man and determine its ownership, because it is necessary as a public matter that the ownership of real estate should be judicially determined and fixed, why cannot the state, for the same reason and to the same end, do the same thing through its Court of Land Registration as to the real estate of a living person? It is the *real estate* in which the sovereign power is interested, not the rights, past or present, of any individual, alive or dead. Is there any reason why the proceeding for initial registration, therefore, should not be treated as a proceeding *in rem*, or in the nature of a proceeding *in rem*, or that the state should be held to be precluded from treating it as such a proceeding, and making such provision for notice as is reasonable under the circumstances? We submit that there is not.

Mr. Justice Loring says (Record, p. 53) that if these proceedings are upheld as proceedings *in rem*, "it is within the constitutional power of the Legislature to provide that any property within the territorial limits of the Commonwealth, real or personal, corporeal or incorporeal, may be recovered, or any title therein or lien thereto established, in a proceeding in which no defendant need be named and no notice need be given except notice by publication." It is respectfully submitted, however, that this does not necessarily follow if the view above expressed is correct. The ultimate test of the power of the state in this respect is not alone whether the property concerned is within its limits, but whether, in addition, the reasonable requirements of justice demand that

the proceeding should be by a proceeding *in rem*, with its accompanying characteristics as to notice.

It may be said generally of the dissenting opinion that it is founded wholly upon the proposition that the Land Registration Act is essentially a process to afford a remedy to an individual land-owner whose title is clouded, by which he may, upon instituting a suit, obtain a judgment, either against known and definite defendants or against all the world, as "parties respondent," forever barring and enjoining them personally from enforcing their rights or claims against him and his property.

But upon this point the opinion entirely overlooks the real purpose, true character of the machinery and the practical result of the Land Registration Act.

The original Torrens system was an administrative system for the regulation of land records and the simplification of land transfer, drawn by an administrative officer, not a lawyer, for the benefit of the body politic in its dealings with real estate, and having nothing to do either with flaws in title or actions either at law or in equity, by any individual or against any individual, for the purpose of obtaining any sort of a judgment whatever.

In Massachusetts the demand for this system and the need of this system were not to enlarge the number or nature of the proceedings, either at law or in equity, by which any individual citizen or citizens sought a remedy through the courts against any other citizens, individually or collectively. Neither was it nor is it (except in a very incidental way) to repair defects and flaws in title. It was the delay and the expense of our present methods of land transfer, and the complicated and expensive and unsafe method of keeping our public land records, which led to the introduction of the Land Registration Act now under consideration. The real purpose is to enable the record titles of real estate in this Commonwealth to be put into such shape and to be kept in such a manner that they can become marketable assets of the owners, readily dealt with, and with the public records kept in a safe and proper form.

It is true the machinery is started by an individual owner, but his petition is not that somebody or anybody shall be enjoined or debarred by any order of the court. Neither

is it that he shall have a judgment against somebody or anybody or everybody. It is merely that the land shall be brought within the operation of the Registration Act as an administrative measure, instead of remaining within the operation of the old registry acts, and that his title thereto (which is simply the equivalent to *the* title thereto) shall be determined ("registered and confirmed," § 21) after a judicial investigation by disinterested officials of the court.

The Land Registration Act in Massachusetts, like that in England and throughout her colonies, is therefore essentially an administrative measure. It really provides for a judicial investigation in aid of a legislative regulation. It is as much a matter of public administration as is taxation, the police power or the exercise of the right of eminent domain, and the same test as to "due process of law" should apply to it as to them.

Whenever by the laws of a state "a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceeding cannot be said to deprive the owner of his property without due process of law."

*Davidson* v. *New Orleans*, 96 U. S. 97.

## V.

The second answer to the objections to the statute, and that which a majority of the Supreme Judicial Court of Massachusetts have considered decisive, is that the statute provides for such reasonable notice as to render the provisions for initial registration constitutional.

*First, as to known persons named in the notice and residing outside of Massachusetts.*

It will doubtless not be denied that publication of notice, together with notice by registered mail, is sufficient as to them. It has been definitely settled by decisions of this court that a state may provide by statute for adjudicating

title to real estate within its limits by a proceeding of which non-residents interested are notified only by *publication*.

*Arndt* v. *Griggs*, 134 U. S. 316.

The doctrine of this case has been re-affirmed in

*Hamilton* v. *Brown*, 161 U. S. 256.
*Lynch* v. *Murphy*, 161 U. S. 247.
*Wehrman* v. *Conklin*, 155 U. S. 314, 321.

See also

*Single* v. *Scott Paper Mfg. Co.*, 55 Fed. Rep. 553.
*Morris* v. *Graham*, 51 Fed. Rep. 53.
*United States* v. *Southern Pacific R.R.*, 63 Fed. Rep. 481.
*Meyer* v. *Kuhn*, 65 Fed. Rep. 705.

*Second, as to known persons named in the notice and residing in Massachusetts.*

The statute provides that notice to them should be given by registered mail. Besides this, notice is to be posted on the land and published, and what amounts to a notice of *lis pendens* is to be filed in the registry of deeds. By St. 1900, c. 354, § 5 (amending § 32 of the original act), proof of actual notice to all adjoining owners and to all persons interested in or having a claim to the land is to be required by the court so far as it deems it possible. It is to be noted that the provisions as to registered mail and proof of actual notice were made by amendments to the original statute passed after the decision of the state court in this case; but this discussion is based on the assumption that the statute will be considered by this court as it stands with these amendments added.

It is said that service of process upon residents known and named, either personally or at the last and usual place of abode, is required by the Constitution, and that the provisions for service by registered mail are unconstitutional.

What is meant by "service of process?" "Process" originally referred to writs which the court issued either to compel attendance before it or to enforce its judgments.

But a rule to show cause or other notice issued by the court is as much process as a capias or subpœna to appear and answer. The distinctive feature is that it issues from the court.

*Dwight* v. *Merritt*, 18 Blatch. 306.
*Kennard* v. *Louisiana*, 92 U. S. 480.
Anderson's Dictionary of Law, 817.

"Personal service" is defined in Anderson's Dictionary of Law, 941, as "delivery of an original writ, notice or other paper, or a copy thereof with oral information as to the contents, to the person who is to be affected by the service." Delivery in hand, however, is not essential. Tendering a copy to the defendant, and on his refusal to accept it throwing it down in his presence after informing him of its contents, is personal service.

1 Archb. Practice (12th ed.), 199.

It cannot be denied that notice or citation issued by order of the Court of Land Registration and duly attested (§ 31) constitutes process within the meaning given above. The question then arises, does the Federal Constitution forbid the notice or process being served by registered mail?

There is no requirement of the Constitution that process should be served by an officer. It may be served by any indifferent person, as in England and New York.

Archbold Pr. (12th ed.), p. 199.
N. Y. Code, §§ 416, 434.

Why then should a state be bound down to service of process by messenger? Is such service a fundamental requirement of justice? When grand juries may be abolished in capital cases and petit juries in criminal and civil cases, is service of process by messenger sacred? (*Hurtado* v. *California*, 110 U. S. 516; *Walker* v. *Sauvinet*, 92 U. S. 90; *Maxwell* v. *Dow*, 176 U. S. 581.) When process was served by arresting the person, and when the jurisdiction of the court depended upon the actual presence of the defendant in court, personal service of process was essential; but since the passage of the various statutes allowing the

filing of "appearances" and authorizing judgment on default, a summons has become nothing but a notice.

It is true that in actions purely *in personam* the jurisdiction of the court is said to depend upon its control over the defendant and to be acquired by service of process.

*Boswell's Lessee* v. *Otis*, 9 How. 336, 348.

But in modern practice that is not the effect of the service of a writ. It does not bring the defendant within the control of the court at all. He is free to go where he likes. It is sufficient that he might have been brought before the court. The service is a mere notification. And there does not seem to be any reason why *as to residents* even a pure action *in personam* to establish a personal liability (such as *Pennoyer* v. *Neff*, 95 U. S. 714) might not constitutionally be possible by filing a petition and proving due notice sent through the mails. It was said in *Beard* v. *Beard*, 21 Ind. 321, 324, that the Legislature might authorize a personal judgment upon constructive notice alone.

See *Bickerdike* v. *Allen*, 157 Ill. 95.
*Crawley* v. *Isaacs*, 16 L. T. (N. S.) 529.
*Reynolds* v. *Fenton*, 3 C. B. 187.

As to non-residents, of course, the rule of *Pennoyer* v. *Neff*, 95 U. S. 714, would prevent the application of this method to such suits against them unless they were within the jurisdiction at the time the suit was begun.

But however this may be there is nothing in the Constitution that requires service of process by messenger in proceedings under this statute. Even if we assume that jurisdiction over persons can be acquired only by service of process by messenger, the assumption is immaterial The jurisdiction of the court under this statute does not depend upon the control it has over persons but over the *land within the state*. This proposition is illustrated by the following cases.

In *Boswell's Lessee* v. *Otis*, 9 How. 336, 348, was presented a case of a bill for a specific performance and an accounting, and in which was a decree for specific performance and accounting; and an adjudication that the amount due on

such accounting should operate as a judgment at law. Service was had by publication, the defendants being non-residents. The validity of a sale under such judgment was in question; the court held that portion of the decree and the sale made under it void; but with reference to jurisdiction in a case for specific performance alone, made these observations: "Jurisdiction is acquired in one of two modes: first, as against the person of the defendant, by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment, beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem* in ordinary cases; but where such a procedure is authorized by statute, on publication, without personal service or process, it is substantially of that character."

In the case of *Parker* v. *Overman*, 18 How. 137, 140, the question of the right of the state to determine the title to land within its limits was presented under an Arkansas statute, authorizing service by publication. While the decision on the merits was adverse, the court thus states the statute, the case and the law applicable to the proceedings under it: "It had its origin in the state court of Dallas County, Arkansas, sitting in chancery. It is a proceeding under a statute of Arkansas, prescribing a special remedy for the confirmation of sales of land by a sheriff or other public officer. Its object is to quiet the title. The purchaser at such sales is authorized to institute proceedings by a public notice in some newspaper, describing the land, stating the authority under which it was sold, and 'calling on all persons who can set up any right to the land so purchased, in consequence of any informality, or any irregularity or illegality connected with the sale, to show cause why the sale so made should not be confirmed.' In case no one appears to contest the regularity of the sale, the court is required to confirm it, on finding certain facts to exist. But if opposition be made, and it should appear that the sale was

made 'contrary to law,' it became the duty of the court to annul it. The judgment or decree in favor of the grantee in the deed operates 'as a complete bar against any and all persons who may thereafter claim such land, in consequence of any informality or illegality in the proceedings.' It is a very great evil in any community to have titles to land insecure and uncertain; and especially in new states, where its result is to retard the settlement and improvement of their vacant lands. Where such lands have been sold for taxes there is a cloud on the title of both claimants, which deters the settler from purchasing from either. A prudent man will not purchase a law-suit, or risk the loss of his money and labor upon a litigious title. The act now under consideration was intended to remedy this evil. It is in substance a bill of peace. The jurisdiction of the court over the controversy is founded on the presence of the property; and, like a proceeding *in rem*, it becomes conclusive against the absent claimant as well as the present contestant. As was said by the court in *Clark* v. *Smith*, 13 Pet. 195, 203, with regard to a similar law of Kentuckey: 'A state has an undoubted power to regulate and protect individual rights to her soil, and declare what shall form a cloud over titles; and, having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the Legislature, having its origin in the peculiar condition of the country. The state legislatures have no authority to prescribe forms and modes of proceeding to the courts of the United States; yet having created a right, and at the same time prescribed the remedy, to enforce it, if the remedy prescribed be substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as in the state court.' In the case before us the proceeding, though special in its form, is in its nature but the application of a well-known chancery remedy; it acts upon the land, and may be conclusive as to the title of a citizen of another state."

In the case of *Pennoyer* v. *Neff*, 95 U. S. 714, 727, 734, in which the question of jurisdiction in cases of service by publication was considered at length, the court, by Mr. Jus-

tice Field, thus stated the law: "Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer *in all actions which are substantially proceedings in rem.* . . . It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors or instituted to partition real estate, foreclose a mortgage or enforce a lien. So far as they affect property in the state, they are substantially proceedings *in rem* in the broader sense which we have mentioned."

Passing to a case later than that, *Huling* v. *Kaw Valley Railway*, 130 U. S. 559, 563, it was held that, in proceedings commenced under a statute for the condemnation of lands for railroad purposes, publication was sufficient notice to a non-resident. In the opinion, Mr. Justice Miller, speaking for the court, says: "Of course, the statute goes upon the presumption that, since all the parties cannot be served personally with such notice, the publication, which is designed to meet the eyes of everybody, is to stand for such notice. The publication itself is sufficient if it had been in the form of a personal service upon the party himself within the county. Nor have we any doubt that this form of warning owners of property to appear and defend their interest, where it is subject to demands for public use when authorized by statute, is sufficient to subject the property to the action of the tribunals appointed by proper authority to determine those matters. The owner of real estate, who is a non-resident of the state within which the property lies, cannot evade the duties and obligations which the law imposes upon him in regard to such property by his absence from the

state. Because he cannot be reached by some process of the courts of the state, which, of course, have no efficacy beyond their own borders, he cannot, therefore, hold his property exempt from the liabilities, duties and obligations which the state has a right to impose upon such property; and in such cases, some substituted form of notice has always been held to be a sufficient warning to the owner of the proceedings which are being taken under the authority of the state to subject his property to those demands and obligations. Otherwise the burdens of taxation and the liability of such property to be taken under the power of eminent domain would be useless in regard to a very large amount of property in every state of the Union."

In *Mellen* v. *Moline Iron Works*, 131 U. S. 352, a bill in equity was brought to foreclose a lien under a trust deed of certain land and personal property in Illinois. The defence was that in a prior bill in equity it had been adjudged against the plaintiff's predecessor, one Hill, that the trust deed gave him no lien. In this former suit Hill was beyond the court's jurisdiction, but he was served with a copy of an order to appear. He did not appear and the bill was taken for confessed against him.

The order to appear was made under 18 Stat. at Large 472, c. 137, § 8, authorizing an order to appear against an absent defendant in any suit brought to enforce a lien upon or to remove a cloud from the title to real or personal property within the district where the suit was brought. Service was to be personal if practicable, otherwise by publication. If the defendant did not appear the court might proceed to a decree which, however, so far as he was concerned should affect only the property within the jurisdiction of the court.

The validity of this statute and the jurisdiction conferred by publication was sustained by this court.

In *Lynch* v. *Murphy*, 161 U. S. 247, a suit was brought to cancel a deed of land in Washington, D. C., made to the defendant. The defendant was served only by publication under R. S. § 787, and a decree was entered annulling the deed. The court held that the decree was not void, as it was not in conflict with the Constitution nor against natural justice.

23645



In *Short* v. *Caldwell*, 155 Mass. 57, a petition was brought under St. 1882, c. 237, to clear the record title to land in Massachusetts from the incumbrance of an undischarged mortgage. The act provides that: "When the record title of real estate is incumbered by an undischarged mortgage, and the mortgagor and those having his estate in the premises have been in uninterrupted possession of such real estate for twenty years after the expiration of the time limited in the mortgage for the full performance of the conditions thereof, he or they may apply to the Supreme Judicial Court by petition, setting forth the facts, and asking for a decree as hereinafter provided; and if, *after notice to all persons interested*, by publication or otherwise as the court may order, no evidence is offered of any payment on account of the debt secured by said mortgage within said twenty years, or of any other act within said time in recognition of its existence as a valid mortgage, the court may enter a decree setting forth such facts and its findings in relation thereto, which decree shall, within thirty days, be recorded in the proper registry of deeds, and thereafter no action shall be brought by any person to enforce a title under said mortgage." The respondents, who were non-residents, were the heirs of the alleged mortgagee. No service of the petition was made on them in Massachusetts. They appeared specially and objected to the jurisdiction of the court, because they were non-residents, relying upon the cases of *Macomber* v. *Jaffray*, 4 Gray, 82, *Leary* v. *Duff*, 137 Mass. 147, 150, and *Thompson* v. *Cowell*, 148 Mass. 552, which decided that the court had no jurisdiction under P. S., c. 176, to compel a non-resident claimant to land not personally served with process within the Commonwealth to bring an action to try his title. The court decided, however, that it had jurisdiction, saying, as to the two statutes (P. S., c. 176, and St. 1882, c. 237): —

"There is, however, an important difference between the two statutes. The P. S., c. 176, authorize a decree *in personam*, while St. 1882, c. 237, authorizes a decree *which simply operates on the estate*. The respondents are not called upon to do anything under it. The estate is here, and the

court may proceed to enter a decree which affects it, even though persons interested therein may be non-residents."

The most important of all these cases, however, is *Arndt* v. *Griggs*, 134 U. S. 316. It was there held that a statute was constitutional which provided for the adjudication of title to real estate within its limits as against non-resident defendants notified only by publication. It was contended in that case that in accordance with the doctrine of *Hart* v. *Sansom*, 110 U. S. 151, in a suit to quiet title no decree entered on service by publication alone was valid because an action to quiet title was a suit in equity; equity acted upon the person; and a person was not brought into court by service by publication alone. In dealing with this argument, the court said (p. 320): —

"While these propositions are doubtless correct as statements of the general rules respecting bills to quiet title and proceedings in courts of equity, they are not applicable or controlling here. The question is not what a court of equity by virtue of its general powers and in the absence of statute might do, but it is what jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts to determine the validity and extent of the claims of non-residents to such real estate? If a state has no power to bring a non-resident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. *It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto.* It cannot bring the person of a non-resident within its limits, — its process goes not out beyond its borders, — but it may determine the extent of his title to real estate within its limits; and for the purpose

of such determination may provide *any reasonable methods of imparting notice.*"

The distinction between statutory proceedings to declare title providing for notice by publication and bills to quiet title under the general equity jurisdiction is illustrated by the case of *Hart* v. *Sansom*, 110 U. S. 151. In that case the question was whether a former judgment of a Texas court had adjudicated the title to certain land between the parties. This judgment had been entered in a suit brought against the plaintiff by the defendant to remove an alleged cloud upon the land, and was based upon service by publication against the plaintiff, who was a citizen of New York. The court held that the former judgment was not an adjudication of title saying: "Generally, if not universally, equity jurisdiction is exercised *in personam* and not *in rem*, and depends upon the control of the court over the parties by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled or to execute a release to the plaintiff."

The distinction between the cases where a court is authorized to make a decree *operating directly upon the estate*, and those where the decree is effective only because it compels persons to act or to refrain from acting, is further recognized in

*Sugg* v. *Thornton*, 132 U. S. 524.
*Dull* v. *Blackman*, 169 U. S. 243.

It comes, then, to this. The proceedings for initial registration are not *in personam*, but since they end in a decree operating directly upon the land, the jurisdiction of the court to entertain them does not depend upon its control over persons but over the land. In such a case, therefore, following *Arndt* v. *Griggs*, the state may "provide any reasonable methods of imparting notice." If process may be

dispensed with altogether in the case of non-residents there can be no constitutional requirement that it must be served by messenger upon residents. The Federal Constitution must protect both residents and non-residents equally. If the right to be served with process by messenger is a fundamental right, it cannot be denied to non-residents and preserved to residents. But if service of process by messenger in these proceedings is a mere form which the state may dispense with as to non-residents, and is not based upon any fundamental principle at all, it may be dispensed with as to residents also. That service by registered mail, together with posting on the land, publishing and filing a notice of *lis pendens*, with proof of actual notice where the court deems it possible, is a reasonable method of imparting notice, and quite as adequate as service by messenger, cannot be denied (*Crawley* v. *Isaacs*, 16 L. T. (N. S.) 529). The statement by Mr. Justice Loring of the purpose for which the mail was originally devised (Record, p. 41), is not material. It is not the purpose for which either the mail service or service by deputy sheriff was originally devised, or how it originally worked, but what the conditions are to-day, that is important. The object of either method is to get notice to any person who ought to have notice. In 1644 or 1799 the best possible method of getting actual notice of a judicial proceeding to a man was to send the notice to the local sheriff to be served. To-day the very best possible method known to the law, to business, to social life, or to anything else, of actually reaching a man personally is a registered letter in the United States mail. Upon this point the Supreme Judicial Court of Massachusetts said (Record, p. 37): "When we are considering a proceeding of this kind it seems to us within the power of the Legislature to say that the mail as it is managed in Massachusetts is a sufficient messenger to convey the notice when other means of notifying the party, like publishing and posting, also are requisite."

It is to be observed that this was said of the statute before it was amended by requiring service by *registered* mail and proof of actual notice.

## VI.

But it is said, however, by the two dissenting judges that the real question in the case does not depend upon whether service by mail is as likely to reach the respondent as service by messenger at the last and usual place of abode. The objection which they consider decisive is that under this statute a person named and interested may be conclusively barred by a decree although not personally served with process, nor notified in fact of the proceedings, and that the act therefore attempts to take away from him his constitutional right to be heard. The argument is (1) that every statute in Massachusetts authorizing a judgment on default based on any but personal service has given to the defendant not notified in fact a right to have the judgment vacated on writ of review; (2) that in Massachusetts and in all the other states, as is alleged, it has been the common law that a judgment based on other than personal service may be directly reviewed or collaterally attached by a defendant not notified in fact; (3) that these propositions are based upon the fundamental doctrine of the common law that no "judgment can be rendered affecting another's rights of person or property without giving to that other an opportunity to be heard"; and finally (4) that "in the light of the well-established general principle that no judgment can be rendered against a man until he has in fact had an opportunity to be heard, and the equally well-established application of that general principle, that a defendant has the right to be heard in review of a judgment rendered under a statute authorizing judgment against him to be entered in his absence, if he did not in fact have notice of the proceedings before the judgment was rendered, which principle has obtained since the first statute authorizing service of process at the last and usual place of abode of the defendant, and was a component part of that act, and which has been universally observed since then, the constitutional provisions in question must be construed to guarantee to every citizen the right to be heard before judgment against him becomes irrevocable; and if the judgment on default is based on any service of process other than personal service on the defend-

ant, provision must be made giving to the defendant who did not in fact have notice of the proceeding before judgment an opportunity afterwards to have it reversed or to attack it collaterally when it is set up against him" (Record, p. 45).

Taking up the argument in the order of the propositions named we first discuss the statement that every statute in Massachusetts authorizing a judgment on default based on any but personal service has given to the defendant not notified in fact a right to have the judgment vacated on writ of review (Record, p. 41).

Even if this statement is true the Supreme Judicial Court of Massachusetts has decided that the statute in question does not violate the requirement of the state Constitution that a person may not be deprived of his property save " by the law of the land " (Const. of Mass., Part 1, Art. XII.). So far as the learned judge's argument goes to the proposition that the right to a review under the circumstances mentioned is guaranteed by the state Constitution that question is foreclosed to this court by the decision of the state court, which has in effect decided that no such right is guaranteed which this statute takes away (*Brown* v. *New Jersey*, 175 U. S. 172). The argument derived from a consideration of these statutes is therefore purely local in its character and does not affect the question whether the right to review is guaranteed by the Fourteenth Amendment. No attempt is made to show that this right of review has always existed in every state of the Union.

But, with all respect, the statement is not accurate. The first Massachusetts statute to authorize a judgment on default on other than personal service gave the right of review to a defendant who was defaulted on service at his last and usual place of abode *if he was out of the jurisdiction* at the time of service. But it is expressly stated by the dissenting judge that it was not until 1820 (St. 1820, c. 53) that the right of review was extended to a defendant who was *within* the Commonwealth at the time of service, upon whom service was made at his last and usual place of abode and who was not actually notified. So that until 1820 such a person was conclusively bound by a judgment on such service although

he never had an opportunity to be heard. The writ of review was instituted by the Legislature in 1644, and from time to time extended, as occasion required, in order that no man should unjustly have a judgment rendered against him or his property when he neither knew, nor probably could know, anything about it. We submit that under the conditions of life as they exist to-day, an absent defendant is exactly as well protected by the provisions of the Land Registration Act providing for the notice of proceedings against him by posting on his land; by actual service of notice upon every one of the adjoining owners; by service of notice upon every one of the adjoining occupants; by publication in the newspapers; by actual service by registered mail upon every person whom the records on an independent judicial investigation disclose as having any possible right whatever; by the twenty days which must of necessity elapse during the proceedings, which, as a matter of practice, extend to fully six weeks; and by the *thirty days thereafter given all the world for an appeal*, as was an absent defendant by the provisions for a writ of review for one year under the conditions of life as they existed at the time when the several statutes providing for review were passed. There is nothing inherent in the law as to a right of review. It rests entirely upon statute. The Legislature created it as it thought the needs of the time demanded, and the same Legislature has, for the same reason, created this new process of law. Why should it not?

It is next asserted that in Massachusetts and in all the other states it has been held that a judgment based on other than personal service may be reviewed and vacated by a defendant not notified in fact, and is not binding, and that this follows from the fundamental doctrine of the common law that no judgment can be rendered affecting another's rights of person or property without giving to that other an opportunity to be heard.

It is not true, except in a very general sense, that it is a fundamental doctrine of the common law that no judgment can be rendered affecting another's rights of person or property without giving to that other an opportunity to be

heard. There were several proceedings known to the common law which resulted in a judgment binding upon a person who never had actual notice of them. The judgment on a writ of right after *mise* joined barred all strangers after the lapse of a year and a day (Booth, Real Actions, 101 in margin). A fine with proclamations had the same effect after the same time or by a later statute after five years (2 Bl. Com., 354; 2 Inst., 510, 518; St. 18 Ed. I., *modus levandi fines;* 34 Ed. III., c. 16; 4 and 5 Hen. VII., c. 24; 32 Hen. VIII., c. 36). By the process of foreign attachment in vogue in London and in other towns in England, as well as in many of the English colonies, goods belonging to a debtor within the jurisdiction in the hands of a third person, or money due from a third person to the debtor, might be attached, and unless the debtor appeared within a year and a day he was absolutely deprived of his property or the debts due him.

*Douglass* v. *Forrest*, 4 Bing. 686.

The common law proceeding of outlawry resulted in a judicial sentence by which a person forfeited his goods and chattels to the king, and became incapable of bringing suit for redress of grievances (3 Bl. Com., 284).

The inquest of office to establish an escheat, or to establish the fact that an alien held lands, which was a cause of forfeiture (3 Bl. 258–60), is another instance in point.

Neither is it true that by a rule of universal application a defendant not personally served with process nor notified in fact of a suit might attack the judgment obtained against him either directly or collaterally. It is admitted that "in some jurisdictions the judgment will not be vacated if the defendant failed to receive notice through a false return of the sheriff, or an unauthorized appearance was made by an attorney, unless a suit on the sheriff's bond or a suit against the attorney fails in fact to give him an adequate remedy" (see also *Finneran* v. *Leonard*, 7 Allen, 54). The case of *Sturgis* v. *Fay*, 16 Ind. 429, was a suit on a note, the writ in which was served by leaving at the defendant's last and usual place of abode. The defendant was defaulted, but at the next term moved to set the verdict aside, filing an affi-

davit that he was absent from the state at the time of service and had no notice of the suit until after judgment. The court held, however, that service at the defendant's residence was actual notice in law and refused to vacate the judgment.

But the cases which are most in point in this connection are those where a foreign judgment has been sued on in the English courts. In such cases it has been open to the defendant to prove anything in the proceedings against natural justice.

In *Crawley* v. *Isaacs*, 16 L. T. (N. S.) 529, a suit was brought in the Court of Exchequer on an Irish judgment for work done. The defence admitted the judgment, but said that the defendant was not served with process nor had notice of the suit. The replication was that the court acting by authority of statute directed the summons to be served upon the defendant by sending a copy by registered mail to him at London and ordered that this should be deemed to be good service unless within six days cause was shown to the contrary. The copy was sent as directed and judgment entered.

It was held that if the mode of procedure upon which a foreign judgment is entered departs from natural justice the judgment will not be enforced in England, but that the procedure of the Irish court was not contrary to natural justice.

The mere fact that the defendant was not served *with process* is not sufficient to warrant the court holding the judgment void as against natural justice. Issuing process is not essential to natural justice.

*Reynolds* v. *Fenton*, 3 C. B. 187.

In *Becquet* v. *McCarthy*, 2 B. & Ad. 951, the law of a British colony required that in a suit against an absent party the process should be served upon the king's attorney-general in the colony, but it was not expressly provided that the attorney-general should communicate with the absent party. It was held that such law was not so contrary to natural justice as to render void a judgment obtained against a party who had resided within the jurisdiction of the court at the time when the cause of action accrued, but had withdrawn himself before the proceedings were commenced. In this

case the contention was that it was contrary to the principles of natural justice that any one should be condemned unheard and in his absence.

In *Cowan* v. *Braidwood*, 1 Man. & Gr. 882, an action was brought upon a Scotch decree. The plea was that the defendant was not in the jurisdiction of the court when the suit was begun nor during its proceedings nor was he notified according to the practice of the court, nor did he know of the proceedings so that he could appear, nor did he appear; and that the decree was contrary to natural justice; but the plea was held insufficient.

Maule, J., said (p. 895): "The courts at Westminster, in sustaining decrees of foreign courts against absent persons, have decided that in their judgment a decree may not be contrary to natural justice, although made against a party who is absent, for absence alone is not sufficient to invalidate the proceedings."

In *Duflos* v. *Burlingham*, 34 L. T. (N. S.) 688, a plea to a declaration on a French judgment was that the defendant was not duly served with process, and that he had no notice of the action nor opportunity to defend himself. The plea was held insufficient.

In *Douglass* v. *Forrest*, 4 Bing. 696, Scotch judgments of *horning* against a Scotchman born were sued on. The judgments were obtained while the defendant was absent from Scotland and he had no notice of them, but according to the law of Scotland this was immaterial. Suit was brought in England on the judgments, and the defendant claimed that they were repugnant to the principles of justice.

Best, C.J., in delivering judgment said that "if these decrees are repugnant to the principles of universal justice this court ought not to give effect to them; but we think that these decrees are perfectly consistent with the principles of justice." He showed that under the process of foreign attachment in the city of London, and in the towns of England and in many of the colonies, if a debt was contracted and suit was brought and a return of *nihil* made, goods belonging to the debtor in the hands of a third person or money due from a third person to the debtor might be attached; and unless the debtor appeared within a year and

a day and disputed the debt he was forever deprived of his property or the debts due to him.

These cases are sufficient to show that the English courts when enforcing foreign judgments have never considered it an essential to natural justice that the defendant should have actual notice of the suit. The essential facts which must appear to render a foreign judgment suable are stated in *Rousillon* v. *Rousillon*, 14 Ch. D. 351, 371, and the presence or absence of notice is *not* essential if the other facts exist which the courts consider sufficient to warrant them in upholding the judgment.

See also *Buchanan* v. *Rucker*, 9 East, 192.
*Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155.
*Copin* v. *Adamson*, L. R. 9 Ex. 345.

And in considering what the requirements of natural justice demand, the existence or non-existence of a right to review the judgment by direct proceedings is not alluded to as material.

## VII.

The objection that the statute is unconstitutional because it attempts to bar unknown persons interested is not well founded.

There is nothing novel about the provisions of the Land Registration Act which authorize an adjudication of the title to real estate in Massachusetts conclusive against all the world, whether named in the citation by name or included under a general description. The act merely extends to the whole field of title principles and procedure which have hitherto covered only a portion of the field. The following citations have the effect to show that in Massachusetts, as well as in most of the other states, it has long been assumed and understood that the Legislature has power to pass statutes under which the rights of parties may be affected by judicial proceedings, notice of which is given by the publication of a citation in general terms, directed to "all persons interested," "unknown owners," etc.

*Partition.*

For at least one hundred and fifty years, in partition proceedings, Massachusetts statutes have provided for a final adjudication conclusive as against possible adverse claimants, whether *known or unknown*, who might have appeared and become parties to the proceedings.

Province Laws, 1742–3, c. 24, provides: —

Whereas the partition of lands is often delayed by reason that the parties concerned therein are very numerous, and live remote from each other, and sometimes in parts beyond the seas, *and are, as to some of them, unknown*, to the hindrance and retarding of improvement and settlements of lands in this province; for remedy whereof, —

*Be it enacted by the Governor, Council and House of Representatives:*

(Section 1.) That from and after the publication of this act, any person or persons interested with any others in any lot or grant of land, or other real estate, making application either by themselves or their lawful agents, attorneys or guardians, to the superior court of judicature, holden for and within the respective counties of this province, where such lot, grant or estate lies, the said court is hereby authorized and empowered to cause partition of such estate to be made, and the share or shares of the party or parties applying for the same, to be set off and divided from the rest, such petition to be made upon oath by five freeholders, or the major part of them, to be appointed by said court, and a return of such partition to be made to the clerk's office of said court; and the partition or division so made, being accepted by the said court, and there recorded, shall be valid and effectual *to all intents and purposes.*

Under this statute, if A brought a petition for partition of land and a notice issued generally to all persons interested and judgment of partition was entered, this judgment was conclusive as to the right of possession as against all persons, known or unknown, named or not named, and whether claiming to own the property in severalty or in common.

*Cook* v. *Allen*, 2 Mass. 462.

When the Revised Statutes were passed the effect of a judgment in partition was extended to cover the right of property as well as possession as between all parties and persons who might have appeared and answered the petition, and certain provisions were enacted meant to guard the rights of absent owners (R. S., c. 103, §§ 33–47).

*Dascomb* v. *Davis*, 5 Met. 335, 340.

But even with these provisions an unknown person was bound as to the method of partition and as to the size of the share to which he was entitled, or indeed whether he was entitled to any at all (§§ 39–42). (See *Foster* v. *Abbot*, 8 Met. 596, 599.) The partition no longer concluded the right of a person claiming to own in severalty (§ 38); and it was provided that "if any person who was a part owner with the petitioner, and for whom a share is left upon the partition, should be out of the state when the summons or notice to him is served and should not return in time to appear and answer to the suit, he may at any time within three years after the final judgment apply to the same court for a new partition of the premises" (R. S. c. 103, § 34). This right, however, did not apply to unknown persons not out of the state at the time of service.

The rule of *Cook* v. *Allen* was followed in Maine in

*Baylies* v. *Bussey*, 5 Greenl. 153, 159.
*Foxcroft* v. *Barnes*, 29 Maine, 128.
P. S., c. 178, §§ 9, 35, 63. St. 1882, c. 6.

*Inquest of Office to establish Escheat.*

In inquests of office to establish an escheat under St. 1791, c. 13, § 2, *general notice* had to be given of the claim of the Commonwealth, and any person was admitted as a party to the proceeding.

*Wilbur* v. *Tobey*, 16 Pick. 177, 180.
Compare *Hamilton* v. *Brown*, 161 U. S. 256.

*Probate of Wills.*

The judgment of a probate court allowing proof of a will and admitting it to probate is conclusive upon the rights of

all persons interested in both the real and personal estate disposed of, whether or not named in the citation.

*Dublin* v. *Chadbourn*, 16 Mass. 433.
*Bonnemort* v. *Gill*, 167 Mass. 338.

In the case of *Bonnemort* v. *Gill* (*supra*), in speaking of the kind of notice given upon a petition for the probate of a will the court said: "Under the rules of court in ordinary practice a general notice is given which is sufficient to justify final proceedings, even if in fact it fails to reach some of the persons interested. . . . The decree of the court admitting the will to probate is in the nature of a judgment *in rem*, which establishes the will against all the world. Any person interested may make himself a party to the proceedings by applying to the proper tribunal, and he is forever bound by the decree, whether he is in fact a party or not."

And a decree probating a will binds all the world, even if no notice at all is issued.

*Crippen* v. *Dexter*, 13 Gray, 330.

The following proceedings have the effect of a judgment *in rem* conclusive on all the world: —

Appointment of guardian is conclusive of the insanity of his ward.

*White* v. *Palmer*, 4 Mass. 147.
*Leonard* v. *Leonard*, 14 Pick. 280.

Allowance of final account of administrator is conclusive that he has fully administered.

*Parcher* v. *Bussell*, 11 Cush. 107.

Decree of distribution of an intestate estate is conclusive as to who are entitled to distribution.

*Loring* v. *Steineman*, 1 Met. 204.

Admiralty decree condemning vessel as prize is conclusive that the vessel was engaged in a breach of blockade.

*Baxter* v. *N. E. Marine Ins. Co.*, 6 Mass. 277.

Appointment of trustee or administrator by probate court is conclusive of the legality of the appointment.

*Bassett* v. *Crafts*, 129 Mass. 513.
*McKim* v. *Doane*, 137 Mass. 195.
*White* v. *Wetherbee*, 126 Mass. 450.

Decree of divorce is conclusive as to the status of the parties.

*Burlen* v. *Shannon*, 3 Gray, 387.

Decree of forfeiture in revenue case is conclusive of the liability of the goods to forfeiture.

*Whitney* v. *Walsh*, 1 Cush. 29.

For other Massachusetts cases, discussing proceedings *in rem* and effects of judgment in such proceedings, see

*Brigham* v. *Fayerweather*, 140 Mass. 411.
*Waters* v. *Stickney*, 12 Allen, 1.
*Shores* v. *Hooper*, 153 Mass. 228.
*Salem* v. *Eastern R.R.*, 98 Mass. 431.

In statutory proceedings under St. 1882, c. 237, to free the record title of real estate from an undischarged mortgage after twenty years' uninterrupted possession by the mortgagor, a decree bars all the world after notice "to all persons interested."

*Short* v. *Caldwell*, 155 Mass. 57.

*Legislation in Other States.*

The so-called Burnt Records Act of Illinois is much in point. Shortly after the great fire in Chicago, in 1871, in which the court house and the entire records of Cook County were destroyed, the Legislature, to remedy the evils arising from the destruction of the public records, passed this act (Laws of Illinois, 1871–2, p. 652. See also 2 Starr & Curtis, 1893). It provides that in case of such destruction the equity courts should have power to inquire into the condition of any title to or interest in any land in the county, and to make all such decrees as might be necessary to determine and establish

such title or interest, legal or equitable, *against all persons known or unknown*, and all liens existing on such lands, whether by statute, mortgage, deed of trust or otherwise. Any person claiming title to any lands in the county at the time of the destruction of its records, or any person claiming under such person, might file a petition in court praying for a decree establishing and confirming his said title. The petition must set out the interest claimed by the petitioner and how he derived title, the names of all persons owning or claiming any estate in fee in, or who should be in possession of, said lands, and also all persons to whom such lands had been conveyed, and the deed or deeds of such conveyance recorded in the office of recorder of deeds since the time of destruction of the records and prior to the filing of the petition, and their residences so far as they were known. All persons so named in the petition were to be made parties and notified of the suit by summons or publication in the same manner as required in chancery proceedings, *unknown owners or claimants to be brought in under the designation of* "all whom it may concern." Any person interested might oppose the petition, demur to or answer it, or file a cross petition if he desired. The decree in the proceeding was declared to be as to the title found forever binding and conclusive, except against minors and insane persons (who had two years after the removal of disabilities to sue out a writ of error), and persons in possession or to whom the lands had been conveyed and the deeds recorded since the destruction of the records and before the filing of the petition and not made parties defendant by name.

This statute has been pronounced constitutional and valid by the Supreme Court of Illinois and of the United States.

*Gormley* v. *Clark*, 134 U. S. 338.
*Bertrand* v. *Taylor*, 87 Illinois, 235.

In Michigan two statutes exist which are strikingly in point. They are 2 Howell's Ann. Statutes, c. 294, and 3 Howell's Ann. Statutes, c. 294 A, and provide for the quieting of titles in the counties of Kent and Charlevoix.

They provide that a person in possession of land in these counties claiming ownership by freehold title may have his

interest ascertained, declared and established. Such person must file with the register of deeds and in the county clerk's office an affidavit describing the land, the interest claimed, the source of title, and thereupon such filing is considered to be the commencement of a suit by the claimant *against all persons having or claiming any interest in the land.* The claimant is required to cause to be published once a week for six successive weeks in a newspaper a notice in substance as follows: —

*Land Claim.*— Take notice. The undersigned claims to have an interest in and to the following described lands, namely (describing the interest claimed). Any person or persons claiming adversely must enter his or their appearance in the county clerk's office of the county of Kent (or Charlevoix) within six months after the first publication of this notice.

If no appearance is entered within the time limited, the case is referred to a commissioner, who takes the proofs of title and reports to the county court his opinion of the validity of the claim. The claimant may then upon application have a judgment of the county court confirming the report and the title certified to, and a certified copy of the judgment under the seal of the court shall be recorded in the register's office, and this record of a duly certified copy "shall be full, sufficient and conclusive evidence in all courts and places, of the title or interest set forth in the judgment." Provision is made for the appearance of adverse claimants and for the trial of such claims.

As indicating the necessity of proceedings in which unknown persons may be concluded after general notice issued, and as showing that it has been universally understood that the Legislature has the power to make provision by statute for such proceedings, we have collated and printed in full in the appendix a large number of such statutes. These statutes are entitled to great consideration.

*Roller* v. *Holly*, 176 U. S. 398, 413.
*Loring* v. *Hildreth*, 170 Mass. 328, 331.

The following table shows the number of states and the kinds of proceedings in which provision is made by statute

for summoning in unknown parties by general description: —

| | No. of States. |
|---|---|
| Partition suits, | 23 |
| Bill in equity under general equity jurisdiction, | 7 |
| Escheat proceedings, | 9 |
| Suits to restore lost records or documents, | 2 |
| Suits to declare, perfect, or quiet title to land in the jurisdiction, | 10 |
| Suits to assign or discharge dower, | 2 |
| Suits to establish boundaries, | 2 |
| Suits to confirm tax titles, | 1 |
| Suits to determine extent of incumbrance to land in the jurisdiction, | 1 |
| Suits to remove incumbrance on title to land in the jurisdiction, | 4 |

In the following cases statutes providing for proceedings to adjudicate the title to land within a state and authorizing decrees against unknown persons cited by publication have been held constitutional.

In *Belcher* v. *Mhoon*, 47 Miss. 613, a statute authorized a person claiming to hold land under a tax title, after the period for redemption had elapsed to bring a bill in chancery, to have his title perfected as against all persons having or claiming any interest in such land existing at the time it was sold for taxes. The statute provided "that any person desirous of perfecting such tax bills, after having filed his bill in the chancery court, as hereinafter provided, shall give thirty days' notice, posted at the court house door of the county in which the lands lie, and in a newspaper printed and published in said county, and if there be no such newspaper printed and published in said county, then in the newspaper published in this state by the state printer, to all persons claiming or having an interest, either legal or equitable, in said lands at the time the same were sold for taxes, to be and appear at the term of the chancery court of the county in which such lands lie and show cause against said tax title, and why the claimants' title should not be confirmed; and said notice shall only be required to be addressed 'to all persons claiming or having an interest, either legal or equitable, in the lands hereinafter described, at the

time the same were sold for taxes, and all such other persons as may be interested therein,' without designating the parties by name; and shall be as valid for all purposes to bind such parties as if directed to them by their names: *provided*, that persons interested in such lands, residing in this state, shall be made parties by name and served with process, unless the complainant or complainants shall make affidavit that their names are unknown. And non-residents having claims to the land shall also be made parties by name, and publication be made for them as in other cases in chancery; unless a like affidavit be made by complainant or complainants that their names are unknown." The court held the statute constitutional, saying: "The bill might well be classified under that head of equity jurisprudence called *quia timet*, extended by the statute much further, however, but resting on that principle. The policy of the statute is to adjudicate upon the validity of the title, not to disturb possession. We think that it is a legitimate exercise of legislative power and discretion."

In *Sullivant* v. *Weaver*, 10 Ohio, 275, a statute authorized proceedings against the heirs of decedents, without naming them where their names were unknown. A decree against unknown heirs under this statute was held valid, the court saying: "We suppose it to be within the legitimate scope of legislative power to direct the forms of process, and the system of proceeding, by which lands lying within its jurisdiction are to be affected; and it seems a convenient and necessary exercise of this power to devise the means of adjudicating the titles to land here where owners are abroad or unknown."

Perhaps the most important decision of a state court outside of Massachusetts is *Shepherd* v. *Ware*, 46 Minn. 174 (1891).

This was an action to recover possession of land. The plaintiff claimed as grantee of one Daniels in 1889. In 1882 Daniels, who had color of title to the land by virtue of certain tax sales, brought an action under the statute (Gen. Sts., 1878, c. 75, § 2) to quiet the title and determine adverse claims to the land. The defendants named were "Benjamin Human and all other persons or parties un-

known, claiming any right, title or interest in the real property described in the complaint on file in the action, and their unknown heirs." The statute (Laws of 1881, extra session, c. 81) provided that in actions to determine adverse claims to real property "the plaintiff may include as defendant in such action, and insert in the title thereof in addition to the names of such persons or parties who are known to have some title, claim, estate, lien or interest in the land in controversy the following, viz.: 'also all other persons or parties unknown, claiming any right, title, estate, lien or interest in the real estate described in the complaint herein.' And service of the summons may be had upon all such unknown persons or parties defendant by publication, as provided by law in case of non-resident defendants. And all such unknown persons or parties so served shall have the same rights as are provided by law in case of all the other defendants upon whom service is made by publication, and the action shall proceed against such unknown persons or parties in the same manner as against the defendants who are named, upon whom service is made by publication, and with like effect; and any such unknown persons or parties who have or claim any right, estate, lien or interest in the said property in controversy at the time of the commencement of the action duly served as aforesaid shall be bound and concluded by the judgment in such case, if the same is in favor of the plaintiff therein, as effectually as if the action was brought against such defendant by his or her name, and personal service of the summons obtained: *provided, however*, that such judgment shall not bind such unknown persons or parties defendant unless the plaintiff shall file a notice of *lis pendens* in the office of registry of deeds, as provided by law, before commencing the publication of the said summons, and a copy of said notice of *lis pendens* be printed and published with said summons and following next thereafter in the columns of the newspapers wherein said summons is printed and published."

In Daniels's suit summons was served by publication, and judgment was rendered by default in Daniels's favor in March, 1888, adjudging that Daniels was the owner and entitled to the possession of the premises.

The defendant claimed under the original patentee by mesne conveyances. The original patent was issued in 1857 to Benjamin Homan. The discrepancy in names (Human and Homan) was a mistake and immaterial. Mesne conveyances from the patentee were made but not recorded immediately, and at the time of Daniels's suit (in 1882) the record title was in Homan, but the title had in fact passed to one Bragg, under whom the defendant claimed. It was necessary therefore that Bragg should have been made a party to the suit brought by Daniels in order to bind the defendant — Bragg's grantee. The question was, therefore, whether the summons by publication to Homan and unknown claimants was sufficient notice to Bragg to make the judgment binding upon his grantee.

It was conceded that the statute was complied with, but the defendant contended that it was unconstitutional as depriving a person of property without due process of law.

The court in a well-considered opinion held that in this class of cases the Legislature might provide for substituted service in case of necessity in an action where the controversy relates to property which is within the jurisdiction of the court, and with a reasonable exercise of such legislative discretion the courts would not assume to interfere. The statute was therefore held constitutional.

In his dissenting opinion Mr. Justice Loring notices that the court in its opinion states that the statute provides that unknown owners should have the right to vacate the judgment within a year. But no reliance was placed upon that feature of the case by the court of Minnesota, the decision being put on the plain ground that "the Legislature may in its discretion provide for substituted service in case of necessity, or where personal notice is for any reason impracticable, in an action where the controversy relates to property which is within the jurisdiction of the court" (p. 178).

In *Loring* v. *Hildreth*, 170 Mass. 328, a bill in equity under general equity jurisdiction was brought to remove a cloud from the title to certain land in Salem, Massachusetts. The cloud consisted in the record of a deed of trust, accord-

ing to which the land was to be held for the life of two women, and at the death of either one-half was to be conveyed to her heirs or her appointees by will. The deed of trust was never delivered.

A guardian *ad litem* was appointed to represent persons unborn and unascertained, under St. 1897, c. 522, authorizing such appointment in such a case, and providing that the suit should be deemed a proceeding *in rem* against the land, and that a decree establishing or declaring the validity, nature or extent of the plaintiff's title might be entered which should operate directly on the land.

The question before the court was whether this statute was constitutional under Massachusetts Bill of Rights, Art. XII., and the Fourteenth Amendment, the defendants contending that there could be no constructive service of process on persons unborn or unascertained because no process at all could reach such persons yet unascertained and unborn. The court held that St. 1897, c. 522, was a necessity to prevent the settlement of title to land from remaining in abeyance for an indefinite period, that the necessity of such statutes was shown by the existence of others of a similar character which "have the effect to show that it has long been assumed and understood that the Legislature has power to pass statutes under which such interests may be affected," and that the statute was constitutional.

In *Hamilton* v. *Brown*, 161 U. S. 256 (1896), the question was whether a judgment in proceedings to establish an escheat bound unknown heirs notified only by publication of a notice "to all persons interested in the estate of" their ancestor.

The statute (General Laws, 1847–48, c. 145) provided that property should escheat to the state on the death of the owner without heirs. To establish the escheat a judicial proceeding by petition was provided. The statute provided that an order of notice should be published requiring "all persons interested in the estate" to appear and show cause why title to it should not be vested in the state; and it allowed all persons named in the petition and any other person claiming an interest in the estate to appear and plead.

If no person appeared judgment was to be rendered by default for the state. If any person appeared and denied the state's claim of title issue was made up and tried, and if the state prevailed it took judgment, otherwise the other party recovered costs. By § 10 it was provided that a judgment of escheat should contain a description of the property and should "*vest the title in the state.*"

The plaintiffs were heirs of one Hamilton, against whose property, after his death, a judgment of escheat had been entered after publication of notice "to all persons interested." It was held that they were barred by this judgment although they had had no notice of the proceedings. The court said: —

"The judgment is conclusive evidence of the state's title in the land, not only against any tenants or claimants having had actual notice by *scire facias*, or having appeared and pleaded, *but also against all other persons interested in the estate and having had constructive notice by publication.* . . . As to personal property, indeed, a judgment *in rem* after notice by publication only might not bind persons who had no actual notice of the proceedings, unless the thing had been first seized into the custody of the court. But it was within the power of the Legislature of Texas to provide for determining and quieting the title to real estate within the limits of the state and within the jurisdiction of the court after actual notice to all known claimants *and notice by publication to all other persons.* . . . When a person dies, the Legislature is under no constitutional obligation to leave the title to his property, real or personal, in abeyance for an indefinite period; but it may provide for promptly ascertaining, by appropriate judicial proceedings, who has succeeded to his estate. If such proceedings are had, after actual notice by service of summons to all known claimants, and constructive notice by publication to *all possible claimants* who are unknown, the final determination of the right of succession, either among private persons, as in the ordinary administration of estates, or between all persons and the state, as by inquest of office or similar process to determine whether the estate has escheated to the public, is *due process of law.*"

It is to be remarked that the judgment in this case was expressly declared to be conclusive against all the world as well those with actual notice as those without. The case does not even allude to the possibility of reviewing the judgment.

It is objected, however, that the purpose of an inquest to establish an escheat is not to divest rights which have vested in the heir but "to ascertain whether such rights shall or shall not vest in the heir" (Record, p. 49), and that the case of *Hamilton* v. *Brown* is not applicable. But the case does not rest on this ground. As Mr. Chief Justice Holmes points out, the decision reaffirms the doctrine of *Arndt* v. *Griggs* (above), viz., that the state may provide for determining titles to its land "after actual notice to all known claimants and notice by publication to all other persons," and rests upon the analogy of a proceeding *in rem* (p. 275).

## VIII.

The objection is made by the dissenting judges that the statute is unconstitutional because it authorizes a decree to be made conclusively barring persons who are not named as defendants.

It is said that by our jurisprudence no person may be barred by a judgment or decree "in a proceeding according to the course of the common law in which the plaintiff asserts rights of property adverse to his unless he is named as a party defendant" (Record, p. 46). It is admitted that the chief end of a proceeding to clear titles is to get rid of the unknown, and that an unknown claim cannot be dealt with by insuring actual notice to the unknown claimant, yet it is said that a judicial proceeding alone cannot clear titles; and that the only way in which this can be accomplished is in connection with the lapse of time on the theory of the statute of limitations because this "has been the means and the only means heretofore used under our jurisprudence to clear titles against unknown claimants." In this connection it is said: "It would be within the constitutional power of the Legislature to enact that the effect of some such decree as is provided for in this act, when properly proclaimed and served, should

have the effect to put the claimant in possession of the title so set up, and that if that possession continued unbroken and the decree setting up the applicant's title remained in force unmodified for a specified time, all the world should be barred" (Record, p. 47).

The reason given for these views is largely if not wholly based upon a consideration of the supposed requirements of "our jurisprudence." We shall assume for purposes of argument that the statement is correct that at common law titles could be cleared only by lapse of time — Does it therefore follow that the state can adopt no other way than this of clearing titles?

It would be strange indeed if this country should find itself precluded from adopting a method of land transfer which is almost universal among the English-speaking states because of the supposed effect of a constitutional limitation derived from Magna Charta, the common heritage of them all. While the British Parliament is theoretically absolute, it is the servant of the nation after all, and it would be vain to contend that in these days the practical limitations imposed upon its powers by public opinion are not sufficient to keep its statute book clear of all unjust, partial and oppressive laws. The traditions of the common law and of English liberty we should expect to be preserved in their purest form in the mother country, and when we find that a modern statute exists in England which in its essential features is the same as the one under consideration, that the system established by that statute has been made *compulsory* in parts of England, and that the same system in substance has been enacted into law in many of the English colonies, all of which take the English common law as the basis of their jurisprudence, we are bound to consider these facts in determining whether *this* statute is oppressive and unjust or whether it is reasonable and proper.

It is not a question of what the precedents of "our jurisprudence" permit. The Fourteenth Amendment does not tie us down to the principles of any one jurisprudence. In the magnificent language of Mr. Justice Matthews in *Hurtado* v. *California*, 110 U. S. 516, 530: "The Constitution of the United States was ordained, it is true, by the descendants of Englishmen, who inherited the traditions of English

law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many times. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice, *suum cuique tribuere*. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and, as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful form."

This court has said that there is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit (*Missouri* v. *Lewis*, 101 U. S. 22, 31). True, this was said with reference to the clause in the Fourteenth Amendment relating to the "equal protection of the laws," but the application of the amendment in connection with the "due process of law" clause was also referred to, and if it had been supposed that the states were confined to the jurisprudence of the common law Mr. Justice Bradley could not in his opinion have said that a state might adopt any system of judicature it saw fit (*Maxwell* v. *Dow*, 176 U. S. 581, 600). Suppose, for instance, the Province of Ontario should become a state in the Union. Can it be doubted that the Torrens law there in force might not continue unchanged and unimpaired? (*Missouri* v. *Lewis*, 101 U. S. 22, 32.) The institutions of the common law are not preserved by the Fourteenth Amendment. Jury trial in

criminal cases is one of the oldest of these institutions. Indictment in a prosecution for murder is another. And yet this court has held that the Fourteenth Amendment does not prevent a state from abolishing indictments in murder cases nor from providing for a trial of a criminal charge by a jury of eight men instead of twelve (*Hurtado* v. *California*, 110 U. S. 516; *Maxwell* v. *Dow*, 176 U. S. 581). In fact, jury trial in suits at common law in state courts may be abolished altogether (*Walker* v. *Sauvinet*, 92 U. S. 90), and this court, following *Maxwell* v. *Dow* to its logical conclusion, will undoubtedly hold that a state may, if it deems it expedient, abolish jury trials in its courts in criminal proceedings. Speaking through Mr. Justice Brewer, the court has recently said (*Brown* v. *New Jersey*, 175 U. S. 172, 175): "The state is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named [that fundamental rights must not be denied nor the provisions of the Federal Constitution be violated] it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary."

In *Brown* v. *New Jersey* (*supra*) the question was whether the statutory provisions of New Jersey for a "struck jury" were in violation of the Fourteenth Amendment. The court said (p. 176): "It [a struck jury] gives the defendant a reasonable opportunity to ascertain the qualifications of proposed jurors, and to protect himself against any supposed prejudices in the mind of any particular individual called as a juror. Whether better or not than any other method, it is certainly a fair and reasonable way of securing an impartial jury, was provided for by the laws of the state, and that is all that due process in this respect requires."

In *Hilton* v. *Guyot*, 159 U. S. 113, 204, the effect to be given in our courts to a French judgment was considered. It was objected that in the proceedings in the French court one of the plaintiffs was allowed to testify not under oath and was not subject to cross-examination, and, further, that papers were admitted in evidence that were immaterial and would have been inadmissible under our system of juris-

prudence. But the court declined to permit the judgment to be impeached on these grounds, it appearing that the practice followed was according to the law of France.

The real question, then, is not whether the statute follows the common law, nor even whether the method of clearing title by the statute is as good or better than the alleged common law method, by lapse of time. It is merely, is this a reasonable way of ascertaining and declaring title to land within the state?

That it is a reasonable method we have shown before in part. The provisions for notice are in substance the equivalent of the corresponding provisions contained in the English and Australian acts.

In the Transfer of Land Act, 1890, of the State of Victoria (54 Vict., No. 1149), which is a fair sample of the Australian legislation, the provisions for notice are by publication once at least in a newspaper, posting a copy of the notice in the office of the registrar, and on the land, and by the registrar sending copies of the notice by registered mail to persons directed to be served with notice, those stated in the application to be occupiers of the land and the occupants and owners of adjoining lands (§§ 23–27). See also the following statutes: —

Queensland, 25 Vict., No. 14, §§ 18–23.

Tasmania, 25 Vict., No. 16, §§ 17–20.

Western Australia, 56 Vict., No. 14 (1893), §§ 21–25.

New Zealand, Land Transfer Act, 49 Vict , No. 57, §§ 21–26.

England, 38–39 Vict., c. 87, §§ 7, 17, 89–92.

That the provisions for notice in the Australian acts have been sufficient is evidenced by the fact that in 1880, when reports of the workings of the Torrens system were sent to England by the governors of the Australian colonies and printed by order of the House of Commons, it appeared that in New South Wales and Tasmania no claim upon the assurance fund had been made since the act was passed eighteen years before; in South Australia, in twenty-two years, only one "trifling claim" had been made; in New Zealand no claim had been made; in Western Australia no payment had

been made from the fund; and that in Victoria £924 had been paid and the fund in 1880 was over £61,000. In Queensland and British Columbia statistics are lacking.

British Blue Book (1872), vol. 42, pp. 3, 96, 136, 153.

British Blue Book (1881), vol. 64, pp. 98, 102, 147, 150, 158.

IX.

The following cases will probably be relied on by the petitioner: —

*State* v. *Guilbert*, 56 Ohio St. 575.
*People* v. *Simon*, 176 Ill. 165.
*Webster* v. *Reid*, 11 How. 437.
*Brown* v. *Levee Commissioners*, 50 Miss. 468.
*Bardwell* v. *Collins*, 44 Minn. 97.

In *State* v. *Guilbert*, the Torrens Act of Ohio was held unconstitutional. The Ohio act, however, was crude and incomplete, and probably deserved the appellation "penitential scheme" which the court, in language hardly judicial, applied to it. It contained scarcely any of the provisions meant to protect the rights of persons interested in the property, and found in the Massachusetts act; and it was held to violate the state Constitution in four separate respects not material to this discussion.

The applicant was not required to state in his application the names of the holders of an estate or interest in the land adverse to his, other than those whose claims he admitted in his application (§§ 7 and 8). Immediately upon the filing of the application the notice was made up and published (§ 12). *There was no preliminary examination of title by an official examiner, as in Massachusetts*, nor indeed does there seem to be any provision requiring *such an examination at any time*. The notice was to be given *by the applicant* by publication once a week for four consecutive weeks in "some newspaper of general circulation" in the county (§ 12). According to the prescribed form of notice, it was not issued by the court nor was it directed to any one by name, but merely "to whom it may concern," and was signed by the

applicant without any official mark of authenticity (§ 13). Immediately upon the first publication the *applicant*, or some other competent person, was directed to serve each person named in the application resident of the county with a copy of the notice, and to serve other persons so named by sending a copy to them by mail (not by registered mail, as in Massachusetts) (§ 14). It is to be noted that the act did not require *adverse claimants* to be named in the application, and they therefore were not served by mail, *but only by publication*.

At the return day the court (the existing probate court or court of common pleas) heard the case if it found that "service of notice has been made as required by §§ 12 and 14" (proof of "actual notice to all adjoining owners and to all persons who appear to have any interest in or claim to the land included in the application," as is required by the Massachusetts statute (§ 22), was not provided for); or it might refer the case to a referee (§ 16) and if the court found the applicant entitled to registration it might make an order accordingly (§ 23). Upon the hearing of an application the court or referee was required to examine "all records, papers and surveys pertaining to the title" of the applicant. This apparently did not necessarily require a search in the registry of deeds.

In discussing the statute the court says (p. 619): "To authorize a court to determine the adverse claims of parties touching their right in things, judicial process is indispensable. Judicial process in its largest sense comprehends all the acts of the court from the beginning of the proceeding to its end. In a narrower sense it is 'the means of compelling a defendant to appear in court after suing out the original writ in civil and after indictment in criminal cases' (Bouvier). In every sense *it is the act of the court.** This act does not contemplate process. The notice which it prescribes is the notice of the law of admiralty. The process required by the law of the land is the process of the common law."

It is submitted that for the reasons above given (pp. 25–55) "process" as distinct from notice is not required by nat-

* The italics are our own.

ural justice and is not essential to "due process of law." If it was held essential to "the law of the land" under the Ohio Constitution the decision is purely local in its effect and is not correct as applied to the "due process of law" clause in the Fourteenth Amendment. The point, however, is immaterial, since "process," even as defined by the Ohio court, is clearly provided for by the Massachusetts statute.

But the chief defect in the Ohio law was not the absence of process. It was the absence of any provision whatsoever for notice in any form other than by publication to those claiming interests in the land even if known to the applicant. The court said as to this (pp. 617–618) that the act does not "require or contemplate that a summons or equivalent preliminary process shall issue from the court advising those who claim interest in the land to be registered that their alleged interests are to be the subject of adjudication in the proceeding. Both by the terms of the act and by the form which it *prescribes the only notice required is to be given by the applicant. In the notice so required to be given no one claiming an interest adverse to that of the applicant is to be named; although the names, places of residence and alleged interests of all who may claim adversely are known.** [By the Massachusetts act such persons must be named.] The terms of the act require that the court shall cause the applicant, or some other competent person, to serve each person named in the application, resident of the county, with a copy of the printed notice. All persons named in the application resident without the county, though within the state, shall be served by sending copies of such notice to their addresses by mail. Only those who are named in the application are required to be served even in this manner. Reference to § 7, providing what the application shall contain, and to its form as prescribed in § 8, shows that the persons to be thus named and served are the *owners* of the *land adjoining* that sought to be registered, the *occupant of the land to be registered*, if it is occupied, *and the holders of easements and estates inferior to the fee simple.**

"One known to claim the title in fee simple adversely to

* The italics are our own.

the applicant need not be named in the application nor receive a copy of the notice, though his place of residence may be within the county and known. As to him the only requirement is that he may have a chance to see a notice signed by the applicant addressed to 'whom it may concern,' containing a brief description of the land to be registered, and published in any newspaper of general circulation within the county. *That this is sufficient notice to those who are interested in the adjoining property is not denied.** Is it such notice as the law of the land requires to be given to persons claiming interests in property of the pendency of a judicial proceeding, in which such interests are to be the subject of adjudication, and in which, unless they appear, a decree will be entered precluding their further assertion?"

As appears by these remarks the real question discussed by the court was, may the rights of a claimant adverse to the applicant whose name and claim are known to the latter, and who may therefore be notified directly, be constitutionally concluded by merely publishing a general notice "to all whom it may concern," and its decision that such rights could not be so concluded was probably correct, if the proceeding was not *in rem*, because such notice would not be reasonable notice. This is the reason why the Illinois court, while upholding the Illinois act, nevertheless agreed that the Ohio act was unconstitutional (*People* v. *Simon*, 176 Ill. 165, 179). But this is not saying, had the statute required the name of such known claimant to be given, and notice by registered mail to be sent to him by a public official, and *actual notice to him to be proved*, that such would have been an unconstitutional mode of procedure. In fact, it seems to have been somewhat singularly conceded that adjoining owners were sufficiently notified by the service by mail under the act. And it is to be noted that the remarks of the court relating to the lack of provision in the Ohio act for mentioning adverse claimants known to the applicant are not applicable to the Massachusetts statute, which has been construed by the state court of last resort to mean that an applicant must state in his application the names of all per-

* The italics are our own.

sons known to set up claims of interest, whether admitted or denied by him (Record, p. 33). This construction binds the Federal court (*Tullis* v. *L. E. & W. R.R.*, 175 U. S. 348).

It does appear to have been the impression of the Supreme Court of Ohio that the Torrens system could not become law, at least in Ohio and possibly in the United States, without a constitutional amendment (pp. 629–630). But its opinion upon this point is purely *obiter*, and the case is no authority to support the objections urged against the Massachusetts act.

In *People* v. *Simon* the Torrens Act of Illinois was held constitutional. It is, however, extremely difficult to state exactly what the court decided upon certain points in that case.

The first point raised in objection was that the statute authorized judgment against a *resident* whose name was known and given in the application upon notice by publication only, the argument probably being that the service of summons was optional (§ 19). The service by mail was to be made only upon those whose addresses were given in the application, and who were not served with process (§ 21).

The court said (p. 176): "While a substituted service is permitted in some instances, particularly in case of non-residents, this is because of the necessities of the case. The act does contemplate, in some contingencies at least, actual personal service, *and the general law provides for publication as to unknown owners and persons in interest, and non-residents** (1 Starr & Curtiss, p. 563, par. 7. See Appendix B, p. lxxv). An applicant may proceed in this way, and in strict accordance with the act obtain a decree or finding as to his title *which will be binding beyond all question*,* so that even if the proper construction of the provision were that it attempted to authorize judgment against a resident notified only by publication, yet the law can be given practical effect, in which event only the particular provision would fail, and not the whole law."

So far from being adverse to our contention this language

* The italics are our own.

strengthens it. The court expressly mentions the provision for publication of notice to unknown owners and parties in interest, and refers to it as a constitutional mode of service.

The second objection was that § 26 tended to deprive persons of their property without "due process of law." That section provided that any person interested, "whether personally served, notified by publication, *or not served at all*,"* should be concluded by the decree after two years. It was said (p. 177) that "this provision seems to attempt to make a decree binding upon persons not parties to the suit, and if given effect literally would deprive persons of vested rights without due process of law." The reference to the literal effect of the section seems to point to the fact that if taken literally the words might mean that no *service at all* was required before a conclusive decree might be entered. This would be transferring property by decree without judicial proceedings at all. The court says: "Even though the language of this section may be broad enough to amount to an attempt to transfer an estate by the law or by decree, yet it is possible to carry out the purposes of the act without violating the Constitution in the respect complained of."

In view of the fact that the court had called attention to the method of serving upon unknown persons by publication it is to be assumed that such persons could be made parties in this way. The decision upon this point seems obscure but it cannot be said that the Illinois court decided that a decree barring unknown persons might not be made after service by publication.

*Webster* v. *Reid* was, as the court said, "an extraordinary procedure from its commencement."

In order to produce the settlement of a large tract of land owned by the half-breed Indians, and known as the "half breed lands," an act of the territory of Iowa was passed under which two men were appointed commissioners and were to receive a fixed per diem compensation. Subsequently another act was passed authorizing the commissioners to begin actions for their services against the owners of the said "half breed lands" and give notice by publica-

* The italics are our own.

tion in a newspaper, and providing that the words "owners of the half breed lands lying in Lee County" should be a sufficient designation "of the defendants in the suit." Under this act these two commissioners recovered judgments for their services, and to satisfy these two claims, aggregating a little over $2,100, the entire tract of the half breeds' land was sold, containing 119,000 acres. The case was a writ of right by a person claiming under this sale to recover possession of the tract. The defence was that the sale was invalid because the judgments were void, being obtained under an unconstitutional statute. The court sustained the point taken by the defendant, saying: "These suits were not proceedings *in rem* against the land but were *in personam* against the owners of it" (p. 459). In this case there was no personal notice nor an attachment or other proceeding against the land until after the judgments.

This was a pure action *in personam* to establish a personal obligation. But a case under the Torrens Law is *not* such an action. If it were, then non-residents could not be bound (*Pennoyer* v. *Neff*, 95 U. S. 714). Since they may lawfully be bound by the proceedings upon mere publication (*Arndt* v. *Griggs*) the proceedings are not *in personam*. If they are not *in personam* then the reasoning of this case is inapplicable, for the decision is expressly based upon the fact that the case was not a proceeding against or concerning any land within the jurisdiction of the court. The case is not authority for the statement that notice by general description (where particular description was impossible) is insufficient to authorize a court to make a decree *affecting property subject to its control* (see *Hamilton* v. *Brown*, 161 U. S. 256).

In *Brown* v. *Board of Levee Commissioners* the defendant board, being duly authorized, caused certain lands to be sold by the sheriff for non-payment of levee taxes and the board bid the land in. Subsequently an act was passed which recited that the title to these lands was clouded by claims, and that it was expedient that they should be quieted, and provided that the board should file in the Chancery Court a petition "against all persons claiming or having any interest, either legal or equitable in said lands," asking for a

sale of the land. The statute provided that no one should be made defendant "by name, designation or description." The notice prescribed was by publication of a notice, accompanied by a list of the lands directed "to all parties or persons having any interest, either legal or equitable, in and to said lands" to show cause why they should not be sold for taxes or to redeem them. It is not at all surprising that this statute was held unconstitutional. Referring to the great extent of the land involved (which extended over a whole county) and the vast number of parties interested whose claims originated from different sources, the court said (p. 484): "In the history of due process of law can any precedent be found of a suit intended in so peremptory and speedy a manner to conclude so many parties and so many and such various rights?" But the real ground of the decision makes the case no authority against the statute here involved. The court expressly recognizes (p. 485) the validity of notice by publication to absent and non-resident defendants who cannot be personally served with notice in suits concerning property within the jurisdiction, and the validity of notice by general description, such as "unknown heirs of a decedent, *where the plaintiff does not know and cannot ascertain their names.*" * (See *Belcher* v. *Mhoon*, 47 Miss. 613, where the court was the same and the opinion was given by the same judge.) "But," it says (p. 485), "there is no instance in our legal history where a judicial process has been allowed in *personal suits*, dispensing with notice actual or constructive, addressed to the parties by name, to be charged thereby, *where it could be readily ascertained who they were.*" * As we have seen, the practice has been so uniform and ancient, that the defendants must be named, *if known*,* and that they must have personal notice by due service, or a constructive notice by some means which the Legislature has prescribed as calculated to come home to the party, that a departure from it in a special case would be obnoxious to the objection that it was not according 'to due process of law.' It is manifest that many, if not most, of the persons claiming these lands are non-residents of the state and of the

* The italics are our own.

respective counties where the suits were brought. *It is also evident that the names of many, if not most, of those were known or could have been known to the levee commissioners.** Yet the law directed that they should not be named defendants by name or other description."

This case, so far from being an authority against the statute discussed in the present case, should be cited as recognizing the validity of notice by publication of a general description when persons remain unknown after diligent inquiry. That this decision, made in 1874, is not regarded in Mississippi as attacking the validity of such notice is evident by the existence in the code of 1880 (§ 578) and that of 1892 (§ 498) (see Appendix B, p. xcii) of the statute providing for proceedings to confirm tax titles held constitutional in *Belcher* v. *Mhoon*, 47 Miss. 613. This statute has been constantly acted upon since 1874.

*Chrismann* v. *Currie*, 60 Miss. 858.
*Metcalf* v. *Perry*, 66 Miss. 68.

In *Bardwell* v. *Collins*, the plaintiff brought an action to enforce a mechanic's lien, alleging that the defendant, one Collins, claimed an interest. The only service was by publication, under a statute allowing service by publication in actions to foreclose mortgages or enforce mechanic's liens upon all parties against whom no personal judgment was sought, even if they were residents personally present and capable of being found. Collins (as the court presumed in its decision) *was a resident and could have been found within the jurisdiction*. The question was whether the court had jurisdiction to pronounce judgment against the defendant.

The court stated the question to be whether the Legislature might constitutionally authorize service of the summons by publication upon defendants in foreclosure suits whom it was not sought to hold personally liable for the mortgage debt, although residents of the state, and although personal service might be made upon them within its jurisdiction; and answered it in the negative.

But this case does not decide nor support the contention

* The italics are our own.

that service of notice upon known residents by registered mail with "proof of actual notice" (see Massachusetts statute, § 32, as amended), together with publication, filing a statement of *lis pendens* and posting on the land, or service upon unknown and undiscoverable persons residents or non-residents, using all such methods, except sending notice by mail, is insufficient in proceedings under the Torrens Act. Indeed, immediately after this case was decided came the decision of the same court in *Shepherd* v. *Ware*, 46 Minn. 174, discussed above, which expressly upheld a statute authorizing a judgment upon proceedings to quiet title to land in the state concluding unknown persons notified by publication of a notice addressed generally to persons unknown, claiming an interest in the real estate described. (Minn. Sts., 1894, § 5818, see Appendix B, p. xci.) Indeed, in *Shepherd* v. *Ware* the court laid stress upon the fact that the judgment affected the property only, and the defendant was not personally bound, and said (p. 177): "This aspect of the question was not considered by this court in reference to this class of actions in *Bardwell* v. *Collins*, 44 Minn. 97." The remarks of the court to the effect that an action to foreclose a mortgage "is not an action *in rem* but an action *in personam*" (p. 101) are contrary to the recent decision of this court in

*Roller* v. *Hardy*, 176 U. S. 398, 406.
Cf. *Bardwell* v. *Anderson* (Minn.), 9 L. R. A. 152.

*Second Assignment of Error.*

The point taken by the second assignment of error is that the provisions of the statute relating to transfers and dealings with registered land after original registration are unconstitutional, because they provide for depriving persons of property without due process of law.

The question here sought to be raised cannot be presented in this case. It is not material unless the provisions relating to dealings in registered land after initial registration are so closely connected with the provisions for initial registration that the latter are invalid if the former are. But such is not

the case. Assuming all the provisions relating to subsequent dealings unconstitutional, nevertheless the provisions for initial registration would be valid. A decree declaring the title would have the same effect whether subsequent transfers were effected in one way or another.

The result would be merely that registered land would be dealt with just as if it were unregistered. This is precisely what is expressly provided for in Lord Cairn's Act (38–39 Vict., c. 87). Section 49 of that act provides that "any person may create estates, rights, interests and equities in the same manner as he might do if the land were not registered."

The objections therefore to the sections attacked do not go to the validity of the whole statute.

*People* v. *Simon*, 176 Ill. 165, 180.

It is the rule of courts, both state and Federal, not to decide constitutional questions until the necessity for such decision arises in the record before the court.

*Baker* v. *Grice*, 169 U. S. 284.

In the present case, therefore, the petitioner cannot be harmed whether the provisions relating to subsequent transfers are held constitutional or not. He does not, as indeed he could not, seek in this suit to restrain any action being taken under those provisions.

If this point is waived, however, the inquiry is, are the provisions in question violative of the Fourteenth Amendment?

A state has the exclusive right to determine the manner in which land within its limits may be transferred or dealt in. The Legislature may make such regulations upon the subject as it deems best for the public welfare. It is absolute in this field.

"It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government

within whose jurisdiction the property is situated. The power of the state in this respect follows from her sovereignty within her limits as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal government. The title and modes of disposition of real property within the state, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal government was created, and would seriously embarrass the landed interests of the state." Mr. Justice Field in

*United States* v. *Fox*, 94 U. S. 315, 320.

See also

*Langdon* v. *Sherwood*, 124 U. S. 74, 81.
*Arndt* v. *Griggs*, 134 U. S. 316, 321.

There is nothing, therefore, to prevent the Legislature from imposing such terms as it deems proper upon the transfer of land once brought under the system. Furthermore, registration is voluntary, and the obtaining of a decree of registration amounts to an agreement running with the land, binding upon the applicant and all his successors in title, that the land shall be and forever remain registered land and subject to the provisions of the act (§ 45).

The argument against the validity of the provisions is that upon the transfer of registered land the recorder or assistant recorder may have to determine certain questions, such as the extent of the land and the nature of the estate sought to be conveyed; whether the grantor is a minor or non compos; whether he is married and whether the conveyance is in fact executed by his wife; whether a power of attorney is sufficient; and whether a sale under a mortgage or trust deed is authorized; that he decides these questions *ex parte*, and since registration is conclusive, if the interest registered is greater than the conveyance was effectual to transfer, the persons really entitled are deprived of their property.

Now the Supreme Judicial Court of Massachusetts has decided that subsequent "registration is the act of the court," and that the recorder or assistant recorder performs

23665



no judicial functions whatsoever. He acts wholly under general orders (Record, p. 38). This interpretation of the statute and the state Constitution must be accepted by this court.

*Louisiana* v. *Pillsbury*, 105 U. S. 278, 294.
*Brown* v. *New Jersey*, 175 U. S. 172.

In ordinary cases no questions at all will be presented. The duties of the recorder and his assistants will be merely ministerial. If a question arises the act provides that it shall be referred to the court for decision, and the court, "after notice to all parties and a hearing," shall prescribe the form of memorandum to be made (§ 53). As the state court says: "The act shows throughout the intent that no one shall be concluded without having a chance to be heard" (Record, p. 38).

HOSEA M. KNOWLTON,
*Attorney-General of Massachusetts.*

FRANKLIN T. HAMMOND,
*Assistant Attorney-General of Massachusetts.*

23666

# APPENDIX A.

# LAND REGISTRATION ACT

## OF MASSACHUSETTS.

# LAND REGISTRATION ACT.

[Chapter 562, Acts of 1898.]

An Act to provide for registering and confirming Titles to Land.

*Be it enacted, etc., as follows:*

Section 1. This act may be cited as the land registration act.

Acts 1899, c. 131, § 1.

Section 2. A court is hereby established, to be called the court of land registration, which shall have exclusive original jurisdiction of all applications for the registration of title to land within the Commonwealth, with power to hear and determine all questions arising upon such applications, and also shall have jurisdiction over such other questions as may come before it under this act, subject however to the right of appeal, as hereinafter provided. The proceedings upon such applications shall be proceedings *in rem* against the land, and the decrees shall operate directly on the land and vest and establish title thereto.

Acts 1900, c. 354, § 1.

The court shall hold its sittings in Boston, but may adjourn from time to time to such other places as the public convenience may require. In the county of Suffolk the board of aldermen of the city of Boston, and in other counties the county commissioners, shall provide suitable rooms for the sittings of the court of land registration, in the same building with or convenient to the probate court or the registry of deeds, and shall provide all necessary books and such printed blanks and stationery for use in registration proceedings as may be ordered by the court.

The court shall have jurisdiction throughout the Commonwealth, and shall always be open, except on Sundays and holidays established by law. It shall be a court of record, and shall cause to be made a seal, and to be sealed therewith all orders, process and papers made by or pro-

ceeding from the court and requiring a seal. All notices, orders and process of said court may run into any county and be returnable as the court may direct.

The court shall from time to time make general rules and forms for procedure, conforming as near as may be to the practice in the probate courts, but subject to the express provisions of this act and to general laws. Such rules and forms before taking effect shall be approved by the supreme judicial court or a justice thereof.

In this act, except where the context requires a different construction, the word court shall mean the court of land registration.

SECTION 3. The governor, with the advice and consent of the council, shall appoint two judges of the court of land registration, one of whom shall be appointed, commissioned and qualified as judge of land registration, and the other as associate judge of land registration, each to hold his office during good behavior; and any vacancy shall be filled in the manner provided by the constitution. Acts 1900, c. 384, § 1.

SECTION 4. The authority and jurisdiction of the court of land registration shall begin and take effect as soon as the judges thereof are appointed and qualified. The court may be held by a single judge, and when so held shall have all the authority and jurisdiction committed to said court. Different sessions may be held at the same time, either in the same county or in different counties, as the judges may decide, and they shall so arrange the sessions as to insure a prompt discharge of the business of the court.

SECTION 5. Citations, orders of notice, and all other process issuing from the court shall bear test of the judge of land registration, and be under the seal of the court and signed by the clerk.

SECTION 6. In case of a vacancy in the office of judge of land registration, or of his absence or inability to perform his duties, the associate judge shall perform them, until the vacancy is filled or any disability is removed.

SECTION 7. The governor, with the advice and consent of the council, shall appoint a recorder, who shall be clerk of the court, and who shall hold his office for the term of five years. He shall attend the sessions of the court and keep a docket of all causes, and shall affix the seal of the court to all process or papers proceeding therefrom and requiring a seal.

SECTION 8. The recorder shall be under the direction of the court, and shall have the custody and control of all papers and documents filed with him under the provisions of this act, and shall carefully number and index the same. Said papers and documents shall be kept in Boston in an office to be called the Land Registration Office, which shall be near the court of land registration. The recorder shall have authority, with the sanction of the court, to employ such assistants and messengers as may be necessary.

SECTION 9. The recorder may act in any county, and after land has been registered under this act he may make all memoranda affecting the title, and enter and issue certificates of title as provided herein.

SECTION 10. The registers of deeds in each registry district, after any land within their respective districts has been registered under this act, shall have the same authority as the recorder to make all memoranda affecting the title of such land, and to enter and issue new certificates of title as provided herein, and to affix the seal of the court to such certificates and duplicate certificates of title; but in executing the provisions of this act the registers of deeds shall be subject to the general direction of the recorder, in order to secure uniformity throughout the Commonwealth; and their official designation shall be assistant recorders for the registry district in which they are severally registers of deeds. In case of the death or disability of the recorder the assistant recorder for the Suffolk district shall perform the duties of the recorder until the vacancy is filled or the disability removed.

SECTION 11. The recorder and all assistant recorders shall be sworn before the judge of land registration, and a record thereof shall be made. They shall give bond in a sum to be fixed by the court, for the faithful performance of their official duties, before entering upon the same. They may administer oaths in all cases in which an oath is required, to persons appearing before them in matters pertaining to the registration of land. They shall keep accurate accounts of all moneys received as fees or otherwise, which shall be subject to examination by the controller of county accounts, in the same manner as accounts of registers of deeds, and they shall pay over such moneys quarterly to the treasurer of the Commonwealth. In case of the absence of any assistant recorder the assistant reg-

ister for the district, or if there is no assistant register the person acting as clerk in the office of the register of deeds, shall perform the duties of the assistant recorder, and the assistant recorder shall be responsible for him.

SECTION 12. The judge of land registration may appoint one or more examiners of title in each county, who shall be attorneys at law, and shall be subject to removal by the supreme judicial court. Acts 1900, c. 354, § 1.

SECTION 13. The salary of the judge of land registration shall be forty-five hundred dollars a year. The salary of the associate judge of land registration shall be four thousand dollars a year. The salaries of the recorder, assistant recorders, examiners of titles, and all assistants and messengers shall be fixed by the governor and council. All salaries and expenses of the court shall be paid from the treasury of the Commonwealth, excepting however that the salaries of the assistant recorders and expenses for clerical services incurred by the assistant recorders under said act shall be paid by their respective counties, and all fees collected by them, except those received upon the filing of applications for registration, shall be paid by them to their respective counties. All fees received with such applications shall be transmitted with the applications to the recorder. So much of section eleven of this act as may be inconsistent herewith is hereby repealed. Acts 1900, c. 354, § 2.

SECTION 14. Every order, decision and decree of the court of land registration shall be subject to appeal to the superior court for the county where the land lies, concerning which the order, decision or decree appealed from was made. The appeal shall be claimed and entered within thirty days from the date of such order, decision or decree, and the party appealing shall at the time of entering his appeal file in the superior court copies of all material papers in the case, certified by the recorder. Appearances and answers shall be filed in the superior court within thirty days after the appeal is entered, unless for good cause further time is allowed, and upon the motion of either party the cause shall be advanced for speedy hearing, and shall be tried by the court, unless either party within the time allowed for entering appearance claims trial by jury, in which case issues for the jury shall be framed. Questions of law arising in the superior Acts 1899, c. 131, § 2.

court may be taken to the supreme judicial court for revision by any party aggrieved, in the same manner as in proceedings at law in the superior court.

Questions of law arising in the court of land registration on any decision or decree may be taken by any party direct to the supreme judicial court for revision, in the same manner as questions of law are taken to that court from the superior court. The court of land registration after any decision or decree dependent upon the determination of questions of law may report such decision or decree for the consideration of the full bench of the supreme judicial court, with so much of the case as is necessary for understanding such questions of law.

Acts 1899, c. 131, § 3.

SECTION 15. At the end of the proceedings on appeal the clerk of the appellate court shall certify to the court of land registration the final decision on the appeal, and the court of land registration shall enter the final decree in the cause, in accordance with the certificate of the clerk of the appellate court.

SECTION 16. If the party appealing does not duly prosecute his appeal within the time limited the original order, decision or decree shall stand as if no appeal had been taken.

SECTION 17. The court of land registration in all matters over which it has jurisdiction may enforce its orders or decrees, in the same manner as decrees are enforced in equity, and upon the request of the judge of land registration the sheriff of any county shall assign a deputy to attend the sittings of the court in that county.

SECTION 18. Costs shall be taxed as in the superior court sitting in equity, where no different provision is made.

ORIGINAL REGISTRATION.

Acts 1900, c. 354, § 3.

SECTION 19. Application for registration of title may be made by the following persons, namely:

First. The person or persons claiming, singly or collectively, to own the legal estate in fee simple.

Second. The person or persons claiming, singly or collectively, to have the power of appointing or disposing of the legal estate in fee simple.

Third. Infants and other persons under disability may make application by their legally appointed guardians; but the person in whose behalf the application is made shall be named as applicant.

Fourth. Corporations may make application by any officer duly authorized by a vote of the directors: *provided, however*, that one or more tenants for a term of years, which is regarded as a fee simple in section one of chapter one hundred and twenty-one of the Public Statutes, shall not be allowed to make application except jointly with those claiming the reversionary interest which makes up the fee simple at common law; nor shall a mortgagor make application without the consent in writing of the mortgagee; nor a married woman without the consent in writing of her husband, unless she holds the land as her separate property or has a power to appoint the same in fee simple, or has obtained a decree of the probate court under the provisions of chapter two hundred and fifty-five of the acts of the year eighteen hundred and eighty-five, as amended by chapter two hundred and ninety of the acts of the year eighteen hundred and eighty-seven; nor one or more tenants claiming undivided shares less than a fee simple in the whole land described in the application.

If the holder of the mortgage does not consent to the making of the application it may be entered nevertheless and the title registered subject to such mortgage, which may be dealt with or foreclosed as if the land subject to such mortgage had not been registered. But the decree of registration in such case shall state that registration is made subject to such mortgage, describing it, which has not been registered, and shall provide that no subsequent certificate shall be issued and no further papers registered relating to such land after a foreclosure of such mortgage.

SECTION 20. The application may be filed with the recorder, or with the assistant recorder at the registry of deeds for the district in which the land, or any portion thereof, lies. Upon filing his application the applicant shall forthwith cause to be filed in the registry of deeds for the said district or districts a memorandum stating that application for registration has been filed, and the date and place of filing, and a copy of the description of the land contained in the application. This memorandum shall be recorded and indexed by the register with the records of deeds. Each assistant recorder shall also keep an index of all applications in his district, and in every case where the application is filed with him shall transmit

Acts 1899, c. 131, § 4.

the same, with the papers and plans filed therewith, and such memorandum when recorded, to the recorder.

SECTION 21. The application shall be in writing, signed and sworn to by the applicant or by some person duly authorized in his behalf. If there is more than one applicant the application shall be signed and sworn to by or in behalf of each. It shall contain a description of the land, and shall state whether the applicant is married; and if married the name of the wife or husband; and if unmarried whether he or she has been married, and if so, when and how the marriage relation terminated; and if by divorce, when, where and by what court the divorce was granted. It shall also state the name in full and the address of the applicant, and also the names and addresses of the adjoining owners and occupants, if known; and if not known it shall state what search has been made to find them. It may be in form as follows:

COMMONWEALTH OF MASSACHUSETTS.

*To the Honorable the Judge of the Court of Land Registration.*

I (or we) the undersigned, hereby apply to have the land hereinafter described brought under the operation and provisions of the land registration act, and to have my (or our) title therein registered and confirmed. And I (or we) declare: (1) That I am (or we are) the owner (or owners) in fee simple of a certain parcel of land with the buildings (if any, and if not, strike out the clause), situate in (here insert accurate description). (2) That said land at the last assessment for taxation was assessed at dollars; and the buildings (if any) at dollars. (3) That I (or we) do not know of any mortgage or encumbrance affecting said land, or that any other person has any estate or interest therein, legal or equitable, in possession, remainder, reversion or expectancy. (If any, add "other than as follows", and set forth each clearly.) (4) That I (or we) obtained title (if by deed, state name of grantor, date and place of record, and file the deed or state reason for not filing. If in any other way, state it). (5) That said land is occupied. (If occupied state name in full and place of residence and post office address of occupant and the nature of his occupancy. If unoccupied, insert "not.") (6) That the names in full and addresses as far as known to me (or us) of the occupants of all lands adjoining said land are as follows: (Give street and number wherever possible. If names not known state whether inquiry has been made, and what inquiry.) (7) That the names and addresses so far as known to me (or us) of the owners of all lands adjoining the above land

are as follows: (Same directions as above.) (8) That I am (or we are) married. (Follow literally the directions given in section twenty-one of the land registration act.) (9) That my (or our) full name (or names), residence and post office address is (or are) as follows:

Dated this day of in the year eighteen hundred and ninety-

(Schedule of documents.)

(Signature.)

COMMONWEALTH OF MASSACHUSETTS.

ss. 189 .

Then personally appeared the above named , known to me to be the signer (or signers) of the foregoing application, and made oath that the statements made therein, so far as made of his (or their) own knowledge are true, and so far as made upon information and belief, that he (or they) believe them to be true, before me,

*Justice of the Peace.*

SECTION 22. If the applicant is not a resident of the Commonwealth he shall file with his application a paper appointing an agent residing in the Commonwealth, giving his name in full and post office address, and shall therein agree that the service of any legal process in proceedings under or growing out of the application shall be of the same legal effect when made on said agent, as if made on the applicant within the Commonwealth. If the agent dies, or removes from the Commonwealth, the applicant shall at once make another appointment; and if he fails to do so the court may dismiss the application.

SECTION 23. Amendments to the application, including joinder, substitution, or discounting as to parties, shall be allowed by the court at any time upon terms that are just and reasonable; but all amendments shall be in writing, signed and sworn to, like the original.

SECTION 24. An application may include two or more contiguous parcels of land, or two or more parcels constituting one holding under one and the same title, within the same registry district. But two or more persons claiming in the same parcels different interests, which collectively make up the legal estate in fee simple in each parcel, shall not join in one application for more than one parcel unless their interests are alike in each and every parcel. The court may at any time order an application to be amended by striking out one or more of the parcels, or by a severance of the application. Acts 1899, c. 131, § 5.

SECTION 25. If the application describes the land as bounded on a public or private way it shall state whether or not the applicant claims any and what land within the limits of the way, and whether the applicant desires to have the line of the way determined.

SECTION 26. The applicant shall file with the application a plan of the land, and all original muniments of title within his control mentioned in the schedule of documents. Such original muniments as affect land not included in the application may be withdrawn on filing certified copies of the same. When an application is dismissed or discontinued the applicant may, with the consent of the court, withdraw such original muniments of title.

Acts 1900, c. 354, § 4.

SECTION 27. When an application is made subject to an existing recorded mortgage, the holder of which has consented thereto or to a recorded lease for a term exceeding seven years, or when the registration is to be made subject to such a mortgage or lease executed after the time of the application and before the date of the transcription of the decree, the applicant shall, if required by the court, file a certified copy of such mortgage or lease, and shall cause the original, or, in the discretion of the court, a certified copy thereof to be presented for registration before a decree of registration is entered, and no registration fee shall be charged for registering such original mortgage or lease or such certified copy.

SECTION 28. The court may by general rule require facts to be stated in the application in addition to those prescribed by this act, and not inconsistent therewith, and may require the filing of any additional papers.

SECTION 29. After the filing of an application, and before registration, the land therein described may be dealt with, and instruments relating thereto shall be recorded in the same manner as if no such application had been filed; but all instruments left for record relating to such land shall be indexed in the usual manner in the registry indexes, and also in the index of applications. As soon as an application is disposed of the recorder shall make a memorandum stating the disposition of the case, and shall send the same to the register of deeds for the proper district or districts, who shall record and index it with the records of deeds, and in the index of applications. If the proceedings upon the application end in a decree of registration of title the land included therein

shall, as soon as the said decree is transcribed, as hereinafter provided in section forty-one, become registered land, and thereafter no deeds or other instruments relating solely to such land shall be recorded with the records of deeds, but shall be registered in the registration book and filed and indexed with the records and documents relating to registered land.

SECTION 30. Immediately after the filing of an application the court shall enter an order referring it to one of the examiners of title, who shall search the records and investigate all facts stated in the application, or otherwise brought to his notice, and file in the case a report thereon, concluding with a certificate of his opinion upon the title. The recorder shall give notice to the applicant of the filing of such report. If the opinion of the examiner is adverse to the applicant he shall be allowed by the court a reasonable time in which to elect to proceed further or to withdraw his application. The election shall be made in writing and filed with the recorder.

SECTION 31. If, in the opinion of the examiner, the applicant has a good title as alleged, and proper for registration, or, if the applicant after an adverse opinion of the examiner, elects to proceed further, the recorder shall, immediately upon the filing of the examiner's opinion, or the applicant's election, as the case may be, cause notice of the filing of the application to be published by the recorder in some newspaper published in the district where any portion of the lands lie. The notice shall be issued by the order of the court, attested by the recorder, and shall be in form substantially as follows:

REGISTRATION OF TITLE.

SUFFOLK ss. COURT OF LAND REGISTRATION.

To (here insert the names of all persons known to have an adverse interest, and the adjoining owners and occupants, so far as known), and to all whom it may concern:

WHEREAS an application has been presented to said court by (name or names and address in full) to register and confirm his (or their) title in the following described land (insert description).

You are hereby cited to appear at the court of land registration to be held at , in said county of on the day of A.D., , at o'clock in the forenoon, to show cause, if any you have, why the prayer

of said application should not be granted. And unless you appear at said court at the time and place aforesaid your default will be recorded, and the said application will be taken as confessed, and you will be forever barred from contesting said application or any decree entered thereon.

WITNESS , Esquire, judge of said court, this day of in the year eighteen hundred and ninety-

Attest:

*Recorder.*

Acts 1900, c. 354, § 5.

SECTION 32. The return day of said notice shall be not less than twenty nor more than sixty days from the date of issue. The court shall also, within seven days after publication of said notice in a newspaper, cause a copy of the same to be mailed by the recorder to every person named therein whose address is known. The court shall also cause a duly attested copy of the notice to be posted in a conspicuous place on each parcel of land included in the application, by a sheriff or deputy sheriff, fourteen days at least before the return day thereof, and his return shall be conclusive proof of such service. If the applicant requests to have the line of a public way determined the court shall order notice to be given by the recorder, by mailing a registered letter to the mayor of the city or to one of the selectmen of the town or towns in which the land lies, or, if the way is a highway, to one of the county commissioners of the county or counties in which the land lies. If the land borders on a river, navigable stream or shore, or on an arm of the sea where a river or harbor line has been established, or on a great pond, or if it otherwise appears from the application or the proceedings that the Commonwealth may have a claim adverse to that of the applicant, notice shall be given in the same manner to the attorney-general. The court may also cause other or further notice of the application to be given in such manner and to such persons as it may deem proper. The court shall, so far as it deems it possible, require proof of actual notice to all adjoining owners and to all persons who appear to have any interest in or claim to the land included in the application. Notice to such persons by mail shall be by registered letter. The certificate of the recorder that he has served the notice as directed by the court, by publishing or mailing, shall be filed in the case before the return day, and shall be conclusive proof of such service.

SECTION 33. Upon the return day of the notice, and proof of service of all orders of notice issued, the court may appoint a disinterested person to act as guardian *ad litem* for minors, and for all persons not in being, unascertained, unknown or out of the Commonwealth, who may have an interest. The compensation of the guardian or agent shall be determined by the court and paid as part of the expenses of the court. Acts 1899, c. 131, § 6.

SECTION 34. Any person claiming an interest, whether named in the notice or not, may appear and file an answer on or before the return day, or within such further time as may be allowed by the court. The answer shall state all objections to the application, and shall set forth the interest claimed by the party filing the same, and shall be signed and sworn to by him or by some person in his behalf.

SECTION 35. If no person appears and answers within the time allowed the court may at once upon motion of the applicant, no reason to the contrary appearing, order a general default to be recorded and the application to be taken for confessed. By the description in the notice, "to all whom it may concern", all the world are made parties defendant and shall be concluded by the default and order. After such default and order the court may enter a decree confirming the title of the applicant and ordering registration of the same. The court shall not be bound by the report of the examiner of title, but may require other or further proof.

SECTION 36. If in any case an appearance is entered and answer filed the cause shall be set down for hearing on the motion of either party, but a default and order shall first be entered against all persons who do not appear and answer, in the manner provided in the preceding section. The court may refer the cause or any part thereof to one of the examiners of title, as master, to hear the parties and their evidence, and make report thereof to the court. His report shall have the same weight as that of a master appointed by the superior court in equity, and he shall proceed according to the rules of said court applicable to masters, except as the same may be modified by the rules of the court of land registration. The court may in any case before decree require a survey to be made for the purpose of determining boundaries, and may order durable bounds to be set, and

referred to in the application, by amendment. The expense of survey and bounds shall be taxed in the costs of the case and may be apportioned among the parties as justice may require. If no persons appear to oppose the application such expense shall be borne by the applicant.

SECTION 37. If in any case the court finds that the applicant has not title proper for registration a decree shall be entered dismissing the application, and such decree may be ordered to be without prejudice. The applicant may withdraw his application at any time before final decree, upon terms to be fixed by the court.

SECTION 38. If the court after hearing finds that the applicant has title as stated in his application, and proper for registration, a decree of confirmation and registration shall be entered. Every decree of registration shall bind the land, and quiet the title thereto, subject only to the exceptions stated in the following section. It shall be conclusive upon and against all persons, including the Commonwealth, whether mentioned by name in the application, notice or citation, or included in the general description "to all whom it may concern." Such decree shall not be opened by reason of the absence, infancy or other disability of any person affected thereby, nor by any proceeding at law or in equity for reversing judgments or decrees; subject however to the right of any person deprived of land or of any estate or interest therein by a decree of registration obtained by fraud to file a petition for review within one year after the entry of the decree, provided no innocent purchaser for value has acquired an interest. If there is any such purchaser the decree of registration shall not be opened but shall remain in full force and effect forever, subject only to the right of appeal hereinbefore provided. But any person aggrieved by such decree in any case may pursue his remedy by action of tort against the applicant or any other person for fraud in procuring the decree.

Acts 1899, c. 131, § 7.

SECTION 39. Every applicant receiving a certificate of title in pursuance of a decree of registration, and every subsequent purchaser of registered land who takes a certificate of title for value and in good faith, shall hold the same free from all encumbrances except those noted on the certificate, and any of the following encumbrances which may be subsisting, namely:

First. Liens, claims or rights arising or existing under

the laws or constitution of the United States which the statutes of this Commonwealth cannot require to appear of record in the registry.

Second. Taxes within two years after the same have been committed to the collector.

Third. Any highway, town way, or any private way laid out under the provisions of section sixty-five of chapter forty-nine of the Public Statutes or any act in amendment thereof or in substitution therefor, where the certificate of title does not state that the boundary of such way has been determined.

Fourth. Any lease for a term not exceeding seven years.

Fifth. Any liability to assessment for betterments, or other statutory liability which may attach to land in this Commonwealth as a lien prior to, or independent of, the recording or registering of any paper: *provided, however*, that if there are easements or other rights appurtenant to a parcel of registered land which for any reason have failed to be registered, such easements or rights shall remain so appurtenant notwithstanding such failure, and shall be held to pass with the land until cut off or extinguished by the registration of the servient estate, or in any other manner.

Section 40. Every decree of registration shall bear date of the year, day, hour and minute of its entry, and shall be signed by the recorder. It shall state whether the owner is married or unmarried, and if married the name of the husband or wife. If the owner is under disability it shall state the nature of the disability, and if a minor shall state his age. It shall contain a description of the land as finally determined by the court, and shall set forth the estate of the owner, and also, in such manner as to show their relative priority, all particular estates, mortgages, easements, liens, attachments and other encumbrances, including rights of husband or wife, if any, to which the land or the owner's estate is subject, and may contain any other matter properly to be determined in pursuance of this act. The decree shall be stated in a convenient form for transcription upon the certificates of title hereinafter mentioned.

Section 41. Immediately upon the entry of the decree of registration the recorder shall send a certified copy thereof, under the seal of the court, to the register of

deeds for the district or districts in which the lands lie, and the register as assistant recorder shall transcribe the decree in a book to be called the registration book, in which a leaf or leaves in consecutive order shall be devoted exclusively to each title. The entry made by the assistant recorder in this book in each case shall be the original certificate of title, and shall be signed by him and sealed with the seal of the court. All certificates of title shall be numbered consecutively, beginning with number one. The assistant recorder shall in each case make an exact duplicate of the original certificate, including the seal, but putting on it the words, "Owner's duplicate certificate", and deliver the same to the owner, or to his attorney duly authorized. In case of a variance between the owner's duplicate certificate and the original certificate the original shall prevail. The certified copy of the decree of registration shall be filed and numbered by the assistant recorder, with a reference noted on it to the place of record of the original certificate of title: *provided*, *however*, that when an application includes land lying in more than one district the court shall cause the part lying in each district to be described separately by metes and bounds in the decree of registration, and the recorder shall send to the assistant recorder for each registry district a copy of the decree containing a description of the land within that district, and the assistant recorder shall register the same and issue an owner's duplicate therefor, and thereafter for all matters pertaining to registration under this act the portion in each district shall be treated as a separate parcel of land.

SECTION 42. The certificate first registered in pursuance of a decree of registration in regard to any parcel of land shall be entitled in the registration book, "Original certificate of title, entered pursuant to decree of the court of land registration, dated at" (stating time and place of entry of decree and the number of the case). The certificate shall take effect from the date of the transcription of the decree. Subsequent certificates relating to the same land shall be in like form, but shall be entitled "Transfer from No. " (the number of the next previous certificate relating to the same land), and also the words "Originally registered" (date, volume and page of registration).

SECTION 43. Where two or more persons are registered

owners as tenants in common, or otherwise, one owner's duplicate certificate may be issued for the whole land or a separate duplicate may be issued to each for his undivided share.

SECTION 44. A registered owner holding one duplicate certificate for several distinct parcels of land may surrender it, with the approval of the court, and take out several certificates for portions thereof. So a registered owner holding separate duplicate certificates for several distinct parcels may surrender them, and, with like approval, take out a single duplicate certificate for the whole land, or several certificates for different portions thereof. Any owner subdividing a tract of registered land into lots shall file with the recorder a plan of such land, when applying for a new certificate or certificates, and the court before issuing the same shall cause the plan to be verified, and require that all boundaries, streets and passageways shall be distinctly and accurately delineated thereon.

SECTION 45. The obtaining of a decree of registration and the entry of a certificate of title shall be regarded as an agreement running with the land, and binding upon the applicant and all his successors in title that the land shall be and forever remain registered land, and subject to the provisions of this act and of all acts in amendment hereof.

SECTION 46. No title to registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession.

SECTION 47. The original certificate in the registration book, any copy thereof duly certified under the signature of the recorder or an assistant recorder, and the seal of the court, and also the owner's duplicate certificate, shall be received as evidence in all the courts of the Commonwealth, and shall be conclusive as to all matters contained therein, except so far as otherwise provided in this act.

SECTION 48. Every certificate of title shall set forth the names of all the persons whose estates make up the estate in fee simple in the whole land, and duplicate certificates may be issued to each person, but the recorder or assistant recorder shall note in the registration book and on each duplicate, to whom such duplicate was issued.

SECTION 49. The recorder, under the direction of the court, shall make and keep indexes of all applications and of all decrees of registration, and shall also index and

classify all papers and instruments filed in his office relat
ing to applications and to registered titles. The recorde
shall also, under the direction of the court, cause forms o
indexes and registration and entry books to be prepared
for the use of the assistant recorders. The court shal
prepare and adopt convenient forms of certificates o
title, and shall also adopt general forms of memoranda t
be used by the assistant recorders in registering the com
mon forms of conveyance, and other instruments to ex
press briefly their effect.

VOLUNTARY DEALING WITH LAND AFTER ORIGINAL REGISTRATION.

SECTION 50. An owner of registered land may convey
mortgage, lease, charge or otherwise deal with the sam
as fully as if it had not been registered. He may us
forms of deeds, mortgages, leases or other voluntary in
struments like those now in use and sufficient in law fo
the purpose intended. But no deed, mortgage or othe
voluntary instrument, except a will and a lease for a ter
not exceeding seven years, purporting to convey or affec
registered land, shall take effect as a conveyance or bin
the land, but shall operate only as a contract between th
parties, and as evidence of authority to the recorder o
assistant recorder to make registration. The act of regis
tration shall be the operative act to convey or affect th
land, and in all cases under this act the registration sha
be made in the office of the assistant recorder for the dis
trict or districts where the land lies.

SECTION 51. Every conveyance, lien, attachment, orde
decree, instrument or entry affecting registered land, whic
would under existing laws, if recorded, filed or entered i
the registry of deeds, affect the real estate to which it re
lates, shall, if registered, filed or entered in the office of th
assistant recorder of the district where the real estate t
which such instrument relates lies, be notice to all perso
from the time of such registering, filing or entering.

SECTION 52. No new certificate shall be entered o
issued upon any transfer of registered land which does no
divest the title in fee simple from the owner or some on
of the registered owners. All interests in registered lan
less than an estate in fee simple shall be registered b
filing with an assistant recorder the instrument creatin
or transferring or claiming such interest and by a bri

memorandum thereof made by an assistant recorder upon the certificate of title, and signed by him. A similar memorandum shall also be made on the owner's duplicate. The cancellation or extinguishment of such interests shall be registered in the same manner.

SECTION 53. Where the assistant recorder is in doubt upon any question, or where any party in interest does not agree as to the proper memorandum to be made in pursuance of any deed, mortgage or other voluntary instrument presented for registration, the question shall be referred to the court for decision, either on the certificate of the assistant recorder stating the question upon which he is in doubt, or upon the suggestion in writing of any party in interest; and the court, after notice to all parties and a hearing, shall enter an order prescribing the form of memorandum to the assistant recorder, who shall make registration in accordance therewith.

SECTION 54. Every deed or other voluntary instrument presented for registration shall contain or have indorsed upon it the full name, place of residence, and post office address of the grantee or other person acquiring or claiming an interest under such instrument, and every deed shall also state whether the grantee is married or unmarried, and if married, give the name in full of the husband or wife. Any change in the residence or post office address of such person shall be endorsed by an assistant recorder on the original instrument, on receiving a sworn statement of such change. All names and addresses shall also be entered on all certificates. Notices and process issued in relation to registered land in pursuance of this act may be served upon any person in interest by mailing the same to the address so given, and shall be binding, whether such person resides within or without the Commonwealth.

SECTION 55. No new certificate of title shall be entered, and no memorandum shall be made upon any certificate of title by the recorder or any assistant recorder, in pursuance of any deed or other voluntary instrument, unless the owner's duplicate certificate is presented with such instrument, except in cases expressly provided for in this act or upon the order of the court, for cause shown; and whenever such order is made a memorandum thereof shall be entered on the new certificate of title and on the owner's duplicate. The production of the owner's duplicate cer-

tificate whenever any voluntary instrument is presented for registration shall be conclusive authority from the registered owner to the recorder or any assistant recorder to enter a new certificate or to make a memorandum of registration in accordance with such instrument, and the new certificate or memorandum shall be binding upon the registered owner and upon all persons claiming under him, in favor of every purchaser for value and in good faith: *provided, however*, that in all cases of registration procured by fraud the owner may pursue all his legal and equitable remedies against the parties to such fraud, without prejudice however to the rights of any innocent holder for value of a certificate of title; and *provided, further*, that after the transcription of the decree of registration on the original application any subsequent registration under this act procured by the presentation of a forged duplicate certificate, or of a forged deed or other instrument, shall be null and void. In case of the loss or theft of an owner's duplicate certificate notice shall be sent by the owner or by some one in his behalf to the assistant recorder for the district in which the land lies, as soon as the loss or theft is discovered.

SECTION 56. Each assistant recorder shall keep an entry book in which he shall enter in the order of their reception all deeds and other voluntary instruments, and all copies of writs or other process filed with him relating to registered land. He shall note in such book the year, month, day, hour and minute of reception of all instruments, in the order in which they are received. They shall be regarded as registered from the time so noted, and the memorandum of each instrument when made on the certificate of title to which it refers shall bear the same date.

Every deed or other instrument, whether voluntary or involuntary, so filed with the recorder or assistant recorder, shall be numbered and indexed, and indorsed with a reference to the proper certificate of title. All records and papers relating to registered land in the office of the recorder or of any assistant recorder shall be open to the public in the same manner as probate records are now open, subject to such reasonable regulations as the recorder, under the direction of the court, may make.

Duplicates of all deeds and voluntary instruments filed and registered may be presented with the originals, and

shall be attested and sealed by the recorder or an assistant recorder, and indorsed with the file number and other memoranda on the originals, and may be taken away by the person presenting the same.

Certified copies of all instruments filed and registered may also be obtained at any time, on payment of the assistant recorder's fees.

CONVEYANCE IN FEE.

SECTION 57. An owner desiring to convey in fee his registered land or any portion thereof shall execute a deed of conveyance, which the grantor or the grantee may present to the assistant recorder in the district where the land lies. The grantor's duplicate certificate shall be produced and presented at the same time. The assistant recorder shall thereupon, in accordance with the rules and instructions of the court, make out in the registration book a new certificate of title to the grantee, and shall prepare and deliver to him an owner's duplicate certificate. The assistant recorder shall note upon the original and duplicate certificates the date of transfer, the volume and page of the registration book where the new certificate is registered, and a reference by number to the last prior certificate. The grantor's duplicate certificate shall be surrendered, and the word "cancelled", stamped upon it. The original certificate shall also be stamped "cancelled." The deed of conveyance shall be filed and indorsed with the number and place of registration of the certificate of title of the land conveyed. Acts 1899, c. 131, § 8.

SECTION 58. When a deed in fee is for a part only of the land described in a certificate of title the assistant recorder shall also enter a new certificate and issue an owner's duplicate to the grantor for the part of the land not included in the deed. In every case of transfer the new certificate or certificates shall include all the land described in the original and surrendered certificates: *provided, however*, that no new certificate to a grantee of a part only of the land shall be invalid by reason of the failure of the assistant recorder to enter a new certificate to the grantor for the remaining unconveyed portion; and *provided, further*, that in case the land described in a certificate of title is divided into lots, designated by numbers or letters, with measurements of all the bounds, and a plan of said land has been filed with the recorder Acts 1900, c. 354, § 6.

and verified pursuant to section forty-four of said a
and a certified copy thereof is recorded in the registrat
book with the original certificate, when the registered ow
makes a deed of transfer in fee of one or more of su
lots, the assistant recorder may, instead of cancelli
such certificate and entering a new certificate to the gran
for the part of the land not included in the deed
transfer, enter on the original certificate and on t
owner's duplicate certificate a memorandum of such de
of transfer, with a reference to the lot or lots there
conveyed as designated on such plan, and that the certi
cate is cancelled as to such lot or lots; and every certi
cate with such memorandum shall be as effectual for t
purpose of showing the grantor's title to the remaind
of the land not conveyed as if the old certificate h
been cancelled and a new certificate of such land had be
entered; and such process may be repeated so long
there is convenient space upon the original certificate a
the owner's duplicate certificate for making such mem
randum of sale of lots.

SECTION 59. If at the time of any transfer there a
pears upon the registration book encumbrances or clai
adverse to the title of the registered owner they shall
stated in the new certificate or certificates, except so f
as they may be simultaneously released or discharged.

MORTGAGES.

SECTION 60. The owner of registered land may mor
gage the same by executing a mortgage deed, and su
deed may be assigned, extended, discharged, released
whole or in part, or otherwise dealt with by the mortgag
by any form of deed or instrument sufficient in law f
the purpose. But such mortgage deed, and all instr
ments assigning, extending, discharging and otherwi
dealing with the mortgage, shall be registered, and sha
take effect upon the title only from the time of registratio

SECTION 61. Registration of a mortgage shall be mad
in the manner following, to wit: — The owner's duplica
certificate shall be presented to the assistant recorder wit
the mortgage deed, and he shall enter upon the origin
certificate of title and also upon the owner's duplicate ce
tificate a memorandum of the purport of the mortgag
deed, the time of filing and the file number of the deed

and shall sign the memorandum. He shall also note upon the mortgage deed the time of filing and a reference to the volume and page of the registration book where it is registered.

The assistant recorder shall also, at the request of the mortgagee, make out and deliver to him a duplicate of the certificate of title, like the owner's duplicate, except that the words "Mortgagee's duplicate" shall be stamped upon it in large letters diagonally across its face. A memorandum of the issue of the mortgagee's duplicate shall be made upon the original certificate of title.

SECTION 62. Whenever a mortgage upon which a mortgagee's duplicate has been issued is assigned, extended or otherwise dealt with, the mortgagee's duplicate shall be presented with the instrument assigning, extending or otherwise dealing with the mortgage, and a memorandum of the instrument shall be made upon the mortgagee's duplicate certificate. When the mortgage is discharged or otherwise extinguished the mortgagee's duplicate certificate shall be surrendered and stamped "cancelled". The production of the mortgagee's duplicate certificate shall be conclusive authority to register the instrument therewith presented, subject however to all the provisions and exceptions contained in section fifty-six of this act so far as the same are applicable.

A mortgage on registered land may be discharged by the mortgagee in person on the registration book in the same manner as a mortgage on unregistered land may be discharged by an entry on the record book in the registry of deeds, and such discharge shall be attested by an assistant recorder.

SECTION 63. Mortgages of registered land may be foreclosed like mortgages of unregistered land; but in case of foreclosure by entry and possession the certificate of entry required by section two of chapter one hundred and eighty-one of the Public Statutes shall be filed and registered by an assistant recorder within thirty days after the entry, in lieu of recording. After possession has been obtained by the mortgagee or his assigns, by entry or by action, and continued for the time required by law to complete the foreclosure, he or his assigns may petition the court of registration for the entry of a new certificate, and the court, after notice to all parties in interest, shall have

jurisdiction to hear the cause, and may order the entry of a new certificate on such terms as equity and justice may require.

In case of foreclosure by action as provided in chapter one hundred and eighty-one of the Public Statutes, and by exercising the power of sale in the mortgage under the direction of the court as provided therein, a certified copy of the final decree of the court confirming the sale may be filed with the assistant recorder, after the time for appealing therefrom has expired, and the purchaser shall thereupon be entitled to the entry of a new certificate.

In case of foreclosure by exercising the power of sale without a previous decree of court the affidavit required by section eighteen of chapter one hundred and eighty-one of the Public Statutes shall be filed and registered with the assistant recorder, in lieu of recording. The purchaser at the foreclosure sale or his assigns may thereupon at any time present the deed under the power of sale to the assistant recorder for filing and registration, and obtain a new certificate, the owner's duplicate certificate and the mortgagee's duplicate, if any, being first delivered up and cancelled: *provided*, *however*, that nothing contained in this act shall be construed to prevent the mortgagor or other person in interest from directly impeaching, by bill in equity or otherwise, any foreclosure proceedings affecting registered land, prior to the entry of a new certificate of title.

After a new certificate of title has been entered no judgment recovered on the mortgage note for any balance due thereon shall operate to open the foreclosure or effect the title to registered land.

LEASES.

SECTION 64. Leases of registered land for a term of seven years or more shall be registered, in lieu of recording. A lessee's duplicate certificate may be issued to the lessee upon his request, subject to the provisions hereinbefore made in regard to a mortgagee's duplicate certificate, so far as the same are applicable.

TRUSTS.

SECTION 65. Whenever a deed or other instrument is filed for the purpose of transferring registered land in trust, or upon any equitable condition or limitation ex-

pressed therein, or for the purpose of creating or declaring a trust or other equitable interest in such land without transfer, the particulars of the trust, condition, limitation or other equitable interest shall not be entered on the certificate; but a memorandum thereof shall be entered by the words "in trust", or "upon condition", or other apt words, and by a reference by number to the instrument authorizing or creating the same. A similar memorandum shall be made upon the duplicate certificate. The assistant recorder shall note upon the original instrument creating or declaring the trust or other equitable interest a reference by number to the certificate of title to which it relates, and to the volume and page in the registration book where it is registered. If the instrument creating or declaring a trust or other equitable interest is already recorded in the registry of deeds or of probate a certified copy may be filed by the assistant recorder and registered.

Section 66. If the instrument creating or declaring a trust or other equitable interest contains an express power to sell, mortgage or deal with the land in any manner, such power shall be stated in the certificate of title by the words "with power to sell", or "with power to mortgage", and by apt words of description in case of other powers. No instrument transferring, mortgaging or in any way dealing with registered land held in trust shall be registered, unless the power thereto enabling is expressly conferred in the instrument of trust, or unless the decree of a court of competent jurisdiction on a bill for instructions or other proceeding has construed the instrument in favor of the power, in which case a certified copy of such decree may be filed with the assistant recorder, and he shall make registration in accordance therewith.

Section 67. When a new trustee of registered land is appointed by the supreme judicial court or the superior or probate court, a new certificate shall be entered to him upon presentation to the assistant recorder of a certified copy of the decree and the surrender of the duplicate certificate.

Section 68. Whoever claims an interest in registered land by reason of any implied or constructive trust shall file for registration a statement thereof with the assistant recorder. The statement shall contain a description of the land, and a reference to the number of the certificate

of title and the volume and page of the registration book where it is entered. Such claim shall not affect the title of a purchaser for value and in good faith before its registration.

SECTION 69. Any trustee shall have authority to file an application for registration of any land held in trust by him, unless expressly prohibited by the instrument creating the trust.

LEGAL INCIDENTS OF REGISTERED LAND.

SECTION 70. Registered land, and ownership therein, shall in all respects be subject to the same burdens and incidents which attach by law to unregistered land. Nothing contained in this act shall in any way be construed to relieve registered land or the owners thereof from any rights incident to the relation of husband and wife, or from liability to attachment on mesne process or levy on execution, or from liability to any lien of any description established by law on land and the buildings thereon, or the interest of the owner in such land or buildings, or to change the laws of descent, or the rights of partition between coparceners and other cotenants, or the right to take the same by eminent domain, or to relieve such land from liability to be recovered by an assignee in insolvency under the provisions of law relating to preferences, or to change or affect in any way any other rights or liabilities created by law and applicable to unregistered land, except as otherwise expressly provided in this act or any amendment hereof.

ATTACHMENTS AND OTHER LIENS.

SECTION 71. In every case where a writing of any description or a copy of any writ is required by law to be filed or recorded in the registry of deeds in order to create or preserve any lien, right or attachment, upon unregistered land, such writing or copy when intended to affect registered land, in lieu of recording, shall be filed and registered in the office of the assistant recorder for the same registry district in which the land lies, and, in addition to any particulars required in such papers for recording with records of deeds, shall also, except in the case of attachment on mesne process, contain a reference to the number of the certificate of title of the land to be affected, and the volume and page of the registration book where the cer-

tificate is registered, and also, if the attachment, right or lien is not claimed on all the land in any certificate of title, a description sufficiently accurate for identification, of the land intended to be affected.

SECTION 72. In every case where an attachment or other lien or adverse claim of any description is registered, and the duplicate certificate is not presented at the time of registration to the assistant recorder, he shall within twenty-four hours thereafter send notice by mail to the registered owner, stating that such paper has been registered, and requesting him to send or produce his duplicate certificate in order that a memorandum of the attachment, or other lien or adverse claim may be made thereon. If the owner neglects or refuses to comply within a reasonable time the assistant recorder shall suggest the fact to the court, and the court after notice shall enter an order to the owner to produce his certificate at a time and place to be named therein, and may enforce the order by suitable process.

SECTION 73. Attachments on mesne process and liens of every description upon registered land shall be continued, reduced, discharged and dissolved by any method sufficient in law to continue, reduce, discharge or dissolve like liens on unregistered land. All certificates or other instruments which are permitted or required by law to be recorded in the registry of deeds to give effect to the continuance, reduction, discharge or dissolution of attachments or other liens upon unregistered lands, or to give notice of such continuance, reduction, discharge or dissolution, shall in the case of like liens upon registered land be filed with the assistant recorder and registered in the registration book, in lieu of recording.

SECTION 74. All the provisions of law now in force relating to attachments of real estate and leasehold estates on mesne process shall apply to registered land, except that the duties required to be performed by the register of deeds shall be performed by the assistant recorder for the registry district where the land lies, who, in lieu of recording, shall register the facts now required to be recorded, and for that purpose shall keep books similar to those now required to be kept for attachments by registers of deeds, and the fees for registering attachments shall be the same as are now provided for recording.

SECTION 75. The name and address of the plaintiff's

attorney shall in all cases be indorsed upon the writ, where an attachment is made, and he shall be deemed to be the attorney of the plaintiff until written notice that he has ceased to be such shall be filed for registration by the plaintiff.

SECTION 76. Whenever an attachment on mesne process is continued, reduced, dissolved or otherwise affected by an order, decision or judgment of the court in which the action or proceeding in which said attachment was made is pending, or by any order of a court of insolvency, a certificate of the entry of such order, decision or judgment from the clerk or register and under the seal of the court, shall be entitled to be registered on presentation to the assistant recorder. A like certificate of the allowance by the court of an amendment which a subsequent attaching creditor or purchaser contends had the effect of dissolving an attachment, may be registered as an amendment allowed, but shall not be conclusive of dissolution, unless the court in which the action or suit is pending adjudicates that the amendment dissolved the attachment, in which case a certificate of the order, as soon as it becomes absolute, shall be registered as a dissolution of the attachment.

SECTION 77. When a mechanic's lien or lien for labor and materials is claimed upon registered and unregistered land, and the original statement required by section six of chapter one hundred and ninety-one of the Public Statutes and amendments thereof is deposited with the register of deeds and recorded, an attested copy of such statement shall be filed with the assistant recorder and registered.

SECTION 78. A lien of any description upon registered land shall be enforced in the same manner as like liens upon unregistered land. Whenever registered land is set off or sold on execution; or taken or sold for taxes, or for any assessment; or sold to enforce a lien for labor or materials; or the lien of a mortgagee or cotenant arising from a payment of taxes; or for an assessment under sections eleven to thirteen of chapter fifty-one of the Public Statutes or any act in amendment thereof; or for costs and charges for taking down dangerous structures under section seventeen of chapter four hundred and eighty-one of the acts of the year eighteen hundred and ninety-four or any act in amendment thereof; or for erecting fences along the line of a railroad corporation under section one hundred and sixteen of chapter one hundred and twelve

of the Public Statutes; or for improving meadows and swamps under sections four to seven of chapter one hundred and eighty-nine of the Public Statutes; or for flowing land under section twenty-two of chapter one hundred and ninety of the Public Statutes; or for any costs and charges incident to such liens; any execution, or copy of the execution, any officer's return, or any deed, demand, certificate or affidavit or other instrument made in the course of proceedings to enforce such liens and required by law to be recorded in the registry of deeds in the case of unregistered land, shall be filed with the assistant recorder for the district where the land lies, and registered in the registration book, and a memorandum made upon the proper certificate of title in each case as an adverse claim or encumbrance.

SECTION 79. Upon the expiration of the time allowed by law for redemption after registered land has been set off or sold on any execution, or taken or sold for the enforcement of any lien of any description, the person claiming under an execution, or under any deed or other instrument made in the course of proceedings to levy such execution or enforce any lien, may petition the court for the entry of a new certificate to him, and the application may be granted: *provided*, *however*, that every new certificate entered under this section shall contain a memorandum of the nature of the proceeding on which it is based; and *provided*, *further*, that where a new certificate is entered in pursuance of any tax title such certificate shall contain a memorandum that it is subject to the rights of redemption reserved in sections fifty-seven and seventy-six of chapter three hundred and ninety of the acts of the year eighteen hundred and eighty-eight or any acts in amendment thereof or in substitution therefor, and *provided*, *further*, that at any time prior to the entry of a new certificate the registered owner may pursue all his legal and equitable remedies to impeach or annul proceedings under executions or to enforce liens of any description.

PENDING SUITS, JUDGMENTS, DECREES AND PARTITIONS.

SECTION 80. No writ of entry, petition for partition, or other action at law, or any proceeding in equity affecting the title to real estate or the use and occupation thereof or the buildings thereon, and no judgment or decree, nor any writ of error, bill of review or other proceeding to

vacate or reverse any judgment or decree, shall have any effect upon registered land as against persons other than the parties thereto, unless a memorandum like that described in section thirteen of chapter one hundred and twenty-six of the Public Statutes and amendments thereof, containing also a reference to the number of the certificate of title of the land affected, and the volume and page of the registration book where it is entered, shall be filed and registered. This section shall not apply to attachments, levies of execution, or to proceedings for the probate of wills, or for administration, in the probate court: *provided, however*, that in case notice of the pendency of the action has been duly registered it shall be sufficient to register the judgment or decree in such action within sixty days after the rendition thereof.

SECTION 81. At any time after final judgment or decree in favor of the defendant, or other disposition in the manner specified in section fourteen of chapter one hundred and twenty-six of the Public Statutes, of any case in which a memorandum has been registered as provided in the preceding section, a certificate of the clerk stating the manner of disposal thereof, as provided in said section fourteen, shall be entitled to registration.

SECTION 82. Whenever in any real action affecting registered land judgment is entered for the plaintiff or demandant, except in actions of ejectment and actions under chapter one hundred and seventy-five of the Public Statutes, relating to terms of less than seven years, such judgment shall be entitled to registration on presentation of a certificate of the entry thereof from the clerk of the court where the action is pending, to the assistant recorder, who shall enter a memorandum upon the certificate of title of the land to which such judgment relates. If the judgment does not apply to all the land described in the certificate of title the certificate of the clerk and the memorandum entered by the assistant recorder shall contain a description of the land affected by the judgment.

SECTION 83. When in any writ of entry an execution or writ of seizin has been issued and served by the officer he shall cause an attested copy of the execution, with a return of his doings thereon, to be filed and registered within three months after the service and before the return of the execution into the clerk's office, and the demandant, in case the judgment was that he was entitled

to an estate in fee simple in the demanded premises, or in any part thereof, and for which execution issued, shall thereupon be entitled to the entry of a new certificate of title: *provided*, that in informations under chapter one hundred and eighty-two of the Public Statutes the Commonwealth shall be entitled to have the certificate of the registered owner cancelled by the court of registration as soon as judgment is rendered in its favor.

SECTION 84. When in a writ of dower judgment is entered confirming the report of the commissioners under section seven of chapter one hundred and seventy-four of the Public Statutes or when in a writ of waste judgment is entered that the plaintiff recover the place wasted, a certificate of the entry of such judgment may be registered as an encumbrance.

SECTION 85. Any decree of a court of equity affecting title or rights in registered land, whether made in the exercise of general equity jurisdiction, or in the exercise of jurisdiction conferred by statute for the quieting of titles or removing clouds from titles, as in chapter two hundred and thirty-seven of the acts of the year eighteen hundred and eighty-two, chapter two hundred and eighty-three of the acts of the year eighteen hundred and eighty-five, chapter four hundred and forty-two of the acts of the year eighteen hundred and eighty-nine, and chapter three hundred and forty of the acts of the year eighteen hundred and ninety-three, or for any similar purpose, may be registered in the same manner as a judgment at law. But every court of equity passing such a decree shall, upon application of the plaintiff or petitioner, order any parties before it to execute for registration any deed or instrument necessary to give effect to its decree, and may require the registered owner to deliver his duplicate certificate to the plaintiff or petitioner to be cancelled or to have a memorandum entered upon it by the assistant recorder. In case the person required to execute any deed or other instrument necessary to give effect to the decree is absent from the Commonwealth, or is a minor, or insane, or for any reason not amenable to the process of the court, the court may appoint some suitable person a trustee to execute such instrument, and the same when executed shall be registered and shall have full force and effect to bind the land to be affected thereby.

SECTION 86. In all proceedings for partition of regis-

tered land, or for the assignment in fee of registered land claimed by husband or wife by statutory right, after the entry of the final judgment or decree of partition and the acceptance of the report of the commissioners, a copy of the judgment or decree and of the return of the commissioners, certified by the clerk or register, as the case may be, shall be filed and registered; and thereupon, in case the land is set off to the owners in severalty, any owner shall be entitled to have a certificate entered of the share set off to him in severalty, and to receive an owner's duplicate therefor. In case the land is ordered by the court to be sold the purchaser or his assigns shall be entitled to have a certificate of title entered to him or them on presenting the deed of the commissioners for registration: *provided*, *however*, that any new certificate entered in pursuance of partition proceedings, whether by way of set off or of sale, shall contain a reference to the final judgment or decree of partition, and shall be conclusive as to the title to the same extent and against the same persons as such judgment or decree is made conclusive by the statutes applicable thereto; and *provided*, *also*, that any person holding such certificate of title or a transfer thereof shall have the right to petition the court at any time to cancel the memorandum relating to such judgment or decree, and the court, after notice and hearing, may grant the application. Such certificate shall thereafter be conclusive in the same manner and to the same extent as other certificates of title.

SECTION 87. When a certified copy of a judgment or decree for partition and of the return of the commissioners is presented for registration, if a mortgage or lease affecting a specific portion or an undivided share of the premises had previously been registered, the tenant claiming under the mortgagor or lessor shall cause the mortgage or lease and any duplicate certificate of title issued to the mortgagee or lessee to be again presented for registration, and the assistant recorder shall indorse on each a memorandum of such partition, with a description of the land set off in severalty on which such mortgage or lease remains in force. Such tenant shall not be entitled to receive his own duplicate certificate of title until such mortgage or lease has been so presented for registration.

INSOLVENCY.

SECTION 88. It shall be the duty of the messenger to register notice of the issuing of a warrant in insolvency against a debtor who is an owner of registered land, when the same is committed to him, by filing a copy thereof with the assistant recorder.

An assignee in insolvency shall be entitled to the entry of a new certificate of registered land of the debtor upon presenting and filing a certified copy of the assignment, with the insolvent's duplicate certificate of title; but the new certificate shall state that it is entered to him as assignee in insolvency.

SECTION 89. Whenever proceedings in insolvency against a registered owner of which notice has been registered are vacated by decree, or when the court of insolvency grants a discharge and orders a reconveyance of land to an insolvent debtor in proceedings under chapter two hundred and thirty-six of the acts of the year eighteen hundred and eighty-four and acts in amendment thereof, a certified copy of the decree, or of such discharge and order, may be filed and registered. If a new certificate has been entered to the assignee in insolvency as registered owner the debtor shall be entitled to the entry of a new certificate to him, and the certificate of the assignee shall be surrendered.

EMINENT DOMAIN.

SECTION 90. Whenever any land of a registered owner, or any right or interest therein, is taken by eminent domain, the Commonwealth or body politic or corporate or other authority exercising such right shall file for registration in the proper registry district a description of the registered land so taken, giving the name of each owner thereof, referring by number and place of registration in the registration book to each certificate of title, and stating what estate or interest in the land is taken, and for what purpose. A memorandum of the right or interest taken shall be made on each certificate of title by the assistant recorder, and where the fee simple is taken a new certificate shall be entered to the owner for the land remaining to him after such taking. In any case where the owner has a lien upon the land taken for his damages it shall be so stated in the memorandum of registration. All fees on account of any memorandum of registration

or entry of new certificates shall be paid by the Commonwealth or body politic or corporate or other authority taking the land.

SECTION 91. When for any reason, by operation of law, land which was taken for a public use reverts to the owner from whom it was taken or to his heirs or assigns, the court upon the petition of the person entitled to the benefit of the reversion, after notice and hearing, may order the entry of a new certificate of title to him.

TRANSFER BY DESCENT AND DEVISE.

SECTION 92. Upon the death of a registered owner his heirs at law or devisees on the expiration of thirty days after the entry of a decree of the probate court granting letters testamentary or of administration, or in case of an appeal from such decree, at any time after the entry of a final decree, may file a certified copy of the final decree of the probate court and of the will, if any, with the assistant recorder, and make application for the entry of a new certificate. The court shall issue notice to the executor and administrator and all other persons in interest, and may also give notice by publication in such newspaper or newspapers as it may deem proper, to all whom it may concern, and after hearing may direct the entry of a new certificate or certificates to the person or persons entitled as heirs or devisees. Any new certificate so entered before the final settlement of the estate of the deceased owner in the probate court shall state expressly that it is entered by transfer from the last certificate by descent or devise, and that the estate is in process of settlement. After the final settlement of the estate in the probate court, or after the expiration of the time allowed by law for bringing an action against an executor or administrator by creditors of the deceased, the heirs at law or devisees may petition the court for an order to cancel the memorandum upon their certificate, stating that the estate is in course of settlement, and the court, after notice and hearing, may grant the petition: *provided*, *however*, that the liability of heirs or devisees of registered land for claims against the estate of the deceased shall not in any way be diminished or changed.

SECTION 93. Nothing contained in this act shall in any way affect or impair the jurisdiction of the probate court to license an executor or administrator or guardian to sell

or mortgage registered land for any purpose for which a license may be granted in the case of unregistered land. The purchaser or mortgagee taking a deed executed in pursuance of such license shall be entitled to a new certificate of title, or memorandum of registration, on presenting his deed to the assistant recorder.

ASSURANCE FUND.

SECTION 94. Upon the original registration of land under this act, and also upon the entry of a certificate showing title as registered owners in heirs or devisees, there shall be paid to the recorder one tenth of one per cent. of the assessed value of the real estate, on the basis of the last assessment for municipal taxation, as an assurance fund.

SECTION 95. All money received by the recorder under the preceding section shall be paid to the treasurer of the Commonwealth. He shall keep the same invested, with the advice and approval of the governor and council, and shall report annually to the general court the condition and income thereof.

SECTION 96. Any person who without negligence on his part sustains loss or damage, or is deprived of land or of any estate or interest therein after the original registration of land under this act, by the registration of any other person as owner of such land or of any estate or interest therein, through fraud or in consequence of any error, omission, mistake or misdescription in any certificate of title or in any entry or memorandum in the registration book, may bring and prosecute an action of contract in the superior court for the recovery of compensation for such loss or damage or for such land or estate or interest therein from the assurance fund: *provided*, *however*, that where the person deprived of land or of any estate or interest therein in the manner above stated has right of action or other remedy for the recovery of the land or of the estate or interest therein, he shall exhaust such right of action or other remedy before resorting to the action of contract herein provided; and *provided*, *further*, that nothing in this act shall be construed to deprive the plaintiff of any action of tort which he may have against any person for such loss or damage, or deprivation of land or of any estate or interest therein. But if the plaintiff elects to pursue his remedy in tort, and also brings an action of

contract under this act, the action of contract sha
continued to await the result of the action of tort.

SECTION 97. If such action of contract is brough
recover for loss or damage or for deprivation of lan
of any estate or interest therein, arising wholly thr
any fraud, negligence, omission, mistake or misfeasan
the recorder, assistant recorder or of any of the exami
of title, in the performance of executive or minist
duties, or of any of the assistants or clerks of the reco
in the performance of their respective duties, then th
tion shall be brought against the treasurer of the Comm
wealth as sole defendant.

If such action is brought to recover for loss or dam
or deprivation of land or of any estate or interest the
arising wholly through any fraud, negligence, omiss
mistake or misfeasance of some person or persons o
than the recorder, assistant recorder or the other offi
and assistants above-named, or arising jointly through
fraud, negligence, omission, mistake or misfeasance
such other person and the recorder, assistant recorde
other officers and assistants above-named, then such
tion shall be brought against both the treasurer of
Commonwealth and such other person or persons, as j
defendants.

SECTION 98. Where there are defendants other t
the treasurer of the Commonwealth, and where judgm
is entered for the plaintiff against the treasurer and agai
some or all of the other defendants, execution shall is
against the other defendants and be levied upon them.
the execution is returned unsatisfied in whole or in pa
and the officer returning the same certifies that the amo
due cannot be collected from the lands or goods of su
other defendants, a justice of the superior court shall
rect the clerk to certify to the governor the amount d
on the execution, and the governor shall draw his warr
therefor upon the treasurer of the Commonwealth, and t
treasurer shall pay the amount out of the assurance fu
without any further act or resolve making an appropr
tion therefor.

When in such action judgment for any reason cann
be entered against all or any of the other defendants
may be entered against the treasurer alone or against t
treasurer and such of the other defendants as are found
be liable, and against whom judgment can lawfully be e

tered. Whenever judgment is entered against the treasurer of the Commonwealth alone, whether in a case where he is sole defendant or joint defendant with others, the justice of the superior court before whom the action is tried shall direct the clerk to transmit to the governor a certificate of the entry of judgment and of the amount due, and the treasurer shall pay the same upon the warrant of the governor, as above provided.

SECTION 99. If the assurance fund at any time is not sufficient to meet the amount called for by such warrant of the governor the treasurer shall make up the deficiency from any funds in the treasury not otherwise appropriated; and in such case any sums thereafter received by the treasurer on account of the assurance fund shall be transferred to the general funds of the treasury, until the amount paid on account of the deficiency shall have been made up.

SECTION 100. In every case where payment has been made by the treasurer of the Commonwealth under warrant from the governor the Commonwealth shall be subrogated to all rights of the plaintiff against any other parties or securities, and the treasurer shall enforce the same in behalf of the Commonwealth. Any sums so recovered by the treasurer shall be paid into the treasury of the Commonwealth to the account of the assurance fund.

SECTION 101. The income of the assurance fund shall be added to the principal and invested, until said fund amounts to the sum of two hundred thousand dollars, and thereafter the income of such fund shall be used to defray, as far as may be, the expenses of the administration of this act, instead of being added to the fund and accumulated.

SECTION 102. The assurance fund shall not be liable to pay for any loss, damage or deprivation occasioned by a breach of trust, whether express, implied or constructive, by any registered owner who is a trustee, or by the improper exercise of any power of sale in a mortgage. Nor shall any plaintiff recover as compensation in an action of contract under this act more than the fair market value of the real estate at the time when he suffered the loss, damage or deprivation thereof. Acts 1899, c. 125, § 1.

SECTION 103. All actions of contract for compensation under this act by reason of any loss or damage or deprivation of land or any estate or interest therein shall be begun within the period of six years from the time when the cause

of action accrued, and not afterwards: *provided, however*, that the plaintiff in an action for the recovery of the land or estate or interest therein in accordance with section ninety-seven of this act may bring the action of contract for compensation within one year after the termination of such action; and *provided, further*, that the action of contract herein provided shall survive to the personal representative of the registered owner, unless barred in his lifetime, but the proceeds thereof shall be treated as real estate.

POWERS OF ATTORNEY.

SECTION 104. Any person may by attorney procure land to be registered and convey or otherwise deal with registered land, but the letters of attorney shall be acknowledged and filed with the recorder or the assistant recorder of the proper registry district, and registered. Any instrument revoking such letters shall be acknowledged and registered in like manner.

LOST DUPLICATE CERTIFICATES.

SECTION 105. If a duplicate certificate is lost or destroyed, or cannot be produced by a grantee, heir, devisee, assignee or other person, applying for the entry of a new certificate to him or for the registration of any instrument, a suggestion of the fact of such loss or destruction may be filed by the registered owner or other person in interest, and registered. The court may thereupon, upon the petition of the registered owner or other person in interest, after notice and hearing, direct the issue of a new duplicate certificate, which shall contain a memorandum of the fact that it is issued in place of a lost duplicate certificate, but shall in all respects be entitled to like faith and credit as the original duplicate, and shall thereafter be regarded as the original duplicate for all the purposes of this act.

ADVERSE CLAIMS.

SECTION 106. Whoever claims any right or interest in registered land adverse to the registered owner arising subsequent to the date of original registration may, if no other provision is made in this act for registering the same, make a statement in writing setting forth fully his alleged right or interest, and how or under whom acquired, and a reference to the volume and page of the certificate

of title of the registered owner, and a description of the land in which the right or interest is claimed. The statement shall be signed and sworn to, and shall state the adverse claimant's residence, and designate a place at which all notices may be served upon him. This statement shall be entitled to registration as an adverse claim, and the court, upon the petition of any party in interest, shall grant a speedy hearing upon the question of the validity of such adverse claim, and shall enter such decree thereon as justice and equity may require. If the claim is adjudged to be invalid the registration shall be cancelled. If in any case the court after notice and hearing shall find that a claim thus registered was frivolous or vexatious it may tax the adverse claimant double costs.

SURRENDER OF DUPLICATE CERTIFICATES.

SECTION 107. In every case where the recorder or any assistant recorder is requested to enter a new certificate in pursuance of an instrument purporting to be executed by the registered owner, or by reason of any instrument or proceedings which divest the title of the registered owner against his consent, if the outstanding owner's duplicate certificate is not presented for cancellation when such request is made, the recorder or assistant recorder shall not enter a new certificate, but the person claiming to be entitled thereto may apply by petition to the court. The court, after a hearing, may order the registered owner or any person withholding the duplicate certificate to surrender the same, and direct the entry of a new certificate upon such surrender.

If in any case the person withholding the duplicate certificate is not amenable to the process of the court, or if for any reason the outstanding owner's duplicate certificate cannot be delivered up, the court may by decree annul the same, and order a new certificate of title to be entered. Such new certificate and all duplicates thereof shall contain a memorandum of the annulment of the outstanding duplicate.

If in any case an outstanding mortgagee's or lessee's duplicate certificate is not produced and surrendered when the mortgage is discharged or extinguished or the lease is terminated, like proceedings may be had to obtain registration as in the case of the non-production of an owner's duplicate.

AMENDMENT AND ALTERATION OF CERTIFICATES OF TITLE.

SECTION 108. No erasure, alteration or amendment shall be made upon the registration book after the entry of a certificate of title or of a memorandum thereon and the attestation of the same by the recorder or an assistant recorder, except by order of the court. Any registered owner or other person in interest may at any time apply by petition to the court, upon the ground that registered interests of any description, whether vested, contingent, expectant or inchoate, have terminated and ceased; or that new interests have arisen or been created which do not appear upon the certificate; or that any error, omission or mistake was made in entering a certificate or any memorandum thereon, or on any duplicate certificate; or that the name of any person on the certificate has been changed; or that the registered owner has been married, or if registered as married that the marriage has been terminated; or that a corporation which owned registered land and has been dissolved has not conveyed the same within three years after its dissolution; or upon any other reasonable ground; and the court shall have jurisdiction to hear and determine the petition after notice to all parties in interest, and may order the entry of a new certificate, the entry or cancellation of a memorandum upon a certificate, or grant any other relief upon such terms and conditions, requiring security if necessary, as it may deem proper: *provided*, *however*, that this section shall not be construed to give the court authority to open the original decree of registration, and that nothing shall be done or ordered by the court which shall impair the title or other interest of a purchaser holding a certificate for value and in good faith, or his heirs or assigns, without his or their written consent.

Any petition filed under this section and all petitions and motions filed under the provisions of this act after original registration shall be filed and entitled in the original case in which the decree of registration was entered.

SERVICE OF NOTICES AFTER REGISTRATION.

SECTION 109. All notices required by or given in pursuance of the provisions of this act by the recorder or any assistant recorder, after original registration, shall be sent

by mail to the person to be notified at his residence and post office address as stated in the certificate of title, or in any registered instrument under which he claims an interest, in the office of the recorder or assistant recorder, relating to the parcel of land in question.

All notices and citations directed by special order of the court under the provisions of this act, after original registration, may be served in the manner above stated, and the certificate of the recorder shall be conclusive proof of such service: *provided, however*, that the court may in any case order different or further service, by publication or otherwise.

FEES FOR REGISTRATION.

SECTION 110. The fees payable under this act shall be as follows:

For every application to bring land under this act, including indexing and recording the same, and transmitting to recorder, when filed with assistant recorder, three dollars.

For every plan filed, seventy-five cents.

For indexing and instrument recorded while application for registration is pending, twenty-five cents.

For examining title, five dollars, and one tenth of one per cent. of the value of the land.

For each notice by mail, twenty-five cents, and the actual cost of printing.

For all services by a sheriff under this act, the same fees as are now provided by law for like services.

For each notice by publication, twenty-five cents, and the actual cost of publication.

For entry of order dismissing application, or decree of registration, and sending memorandum to assistant recorder, one dollar.

For copy of decree of registration, one dollar.

For entry of original certificate of title and issuing one duplicate certificate, three dollars.

For making and entering a new certificate of title including issue of one duplicate certificate, one dollar.

For each additional duplicate certificate, after the first, fifty cents.

For the registration of every instrument, whether single or in duplicate or triplicate, including entering, indexing and filing same and attesting registration thereof, and

also making and attesting copy of memorandum on one instrument or on a duplicate certificate when required, one dollar and fifty cents.

For making and attesting copy of memorandum on each additional instrument or duplicate certificate if required, fifty cents.

For filing and registering an adverse claim, three dollars.

For entering statement of change of residence or post-office address, including indorsing and attesting same on a duplicate certificate, twenty-five cents.

For entering any note in the entry book or in the registration book, twenty-five cents.

For the registration of a suggestion of death or notice of issue of a warrant in insolvency, twenty-five cents.

For the registration of a discharge or release of mortgage or other instrument creating an encumbrance, fifty cents.

For the registration of a memorandum or certificate of entry for possession or deposition in proof thereof, fifty cents.

For the registration of any levy, or of any discharge or dissolution of any attachment or levy, or of any certificate of or receipt for payment of taxes, or of any mechanic's lien or lien for labor or materials, or notice of any pending action or of a judgment or decree, fifty cents.

For indorsing on any mortgage, lease or other instrument a memorandum of partition, one dollar.

For every petition filed under this act after original registration, one dollar.

For a certified copy of any decree or registered instrument, the same fees as are provided by law for registers of deeds.

In all cases not expressly provided for by law the fees of all public officers for any official duty or service under this act shall be at the same rate as those prescribed herein for like services.

PENALTIES.

SECTION 111. Certificates of title and duplicate certificates issued under this act shall be subjects of larceny.

SECTION 112. Whoever knowingly swears falsely to any statement required to be made under oath by this act shall be guilty of perjury, and liable to the statutory penalties for perjury.

SECTION 113. A certificate of title, duplicate certificate

of title, certificate issued in place of a duplicate certificate, the registration book, entry book, and all indexes provided for by this act, and the docket of the recorder, shall be treated as if specifically described and enumerated in section one of chapter two hundred and four of the Public Statutes, and the various acts therein described, when done in reference to the records or instruments hereinbefore mentioned, shall be punished as provided in said section and chapter.

SECTION 114. Whoever forges or procures to be forged, or assists in forging, the seal of the court of land registration, or stamps or procures to be stamped, or assists in stamping, any document with such forged seal, or with the genuine seal of the court of land registration without being duly authorized thereto, shall be punished by imprisonment in the state prison not exceeding ten years or in the jail not exceeding two years.

SECTION 115. Whoever, with intent to defraud, sells and conveys registered land knowing that an undischarged attachment or any other encumbrance exists thereon which is not noted by memorandum on the duplicate certificate of title, without informing the grantee of such attachment or other encumbrance before the consideration is paid, shall be punished by imprisonment in the state prison not exceeding three years, or in the jail not exceeding one year.

SECTION 116. This act shall take effect upon the first day of October in the year eighteen hundred and ninety-eight. *Approved June 23, 1898.*

ORIGINAL CERTIFICATE OF TITLE.

No.

Entered pursuant to a decree of the court of land registration, dated at Boston, in the county of Suffolk and Commonwealth of Massachusetts, the day of in the year , and numbered on the files of said court.

COPY OF DECREE.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. COURT OF LAND REGISTRATION.

In the matter of the petition of numbered after consideration, the court doth adjudge and decree that said of in the county of and Commonwealth of Massachusetts, married the owner in fee simple of that certain parcel of land situate in in the county of and Commonwealth of Massachusetts, bounded and described as follows: —

And the court doth adjudge and decree that said land be brought under the operation and provisions of the land registration act and any acts in amendment thereto, and that the title of said to said land be confirmed and registered; subject, however, to any of the encumbrances mentioned in section 39 of said act as amended by chapter 131 of the Acts of 1899 which may be subsisting, and subject also to

Witness, LEONARD A. JONES, Esq., judge of the court of land registration, at Boston, in said county of Suffolk, the day of in the year at o'clock and minutes in the noon.

Attest, with the seal of said court,
CLARENCE C. SMITH, *Recorder*. [SEAL.]

A true copy. Attest, with the seal of said court,
CLARENCE C. SMITH, *Recorder*. [SEAL.]

Received for transcription at registry district, 1 , at o'clock and minutes M.

A true copy. Attest, with the seal of said court,

*Assistant Recorder.*

*Memoranda of Encumbrances on the Land described in this Certificate.*

| Document Number. | Kind. | Running in Favor of— | Terms. | Date of Instrument. | Date of Registration. | | | | | Signature of Assistant Recorder. | Discharge. |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | Year and Month. | D. | H. | M. | A M. or P M. | | |
| | | | | | | | | | | | |





2368

TRANSFER CERTIFICATE OF TITLE.

No.

From No. , originally registered 1,
in registration book page for the
registry district of County.

This is to certify that
of in the county of and Commonwealth of Massachusetts married
the owner
in fee simple of that certain parcel of land situate in
in the county of
and said Commonwealth, bounded and described as follows: —

And it is further certified that said land is under the operation and provisions of the land registration act, and that the title of said
to said land is registered under said act, subject, however, to any of the encumbrances mentioned in section 39 of said act as amended by chapter 131 of the Acts of 1899 which may be subsisting, and subject also to

Witness, LEONARD A. JONES, Esq., judge of the court of land registration at in said county of the
day of in the year
at o'clock and minutes in the noon.
Attest, with the seal of said court,

*Assistant Recorder.*

*Memoranda of Encumbrances on the Land described in this Certificate.*

| Document Number. | Kind. | Running in Favor of — | Terms. | Date of Instrument. | Date of Registration. | | | | | Signature of Assistant Recorder. | Discharge. |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | Year and Month. | D. | H. | M. | A.M. or P.M. | | |
| | | | | | | | | | | | |

# INDEX TO ACT.

[Numbers relate to sections of the act.]


**ACCOUNTS**, of recorder and assistant recorders, subject to examination of controller, 11.

**ACT**, land registration, how cited, 1.
when took effect, 116.

**ACTION**, of tort for fraud in procuring decree, 38.
real, judgment on, how registered, 82.
of contract against assurance fund, 96.
who shall be parties to such suit, 97.
must be begun within six years, 103.

**ACTION AT LAW**, not to affect registered land unless memorandum is registered, 80.

**ADDRESS**, of owners, how and where entered, 54.
change of, to be endorsed, 54.
of plaintiff's attorney, to be on writ, 75.

**ADMINISTRATION**, copy of decree granting letters of, to be filed, when, 92.
memorandum of, not required, when, 80.

**ADMINISTRATOR**, notice to, before issue of certificates to heirs or devisees, 92.
jurisdiction of probate court to license sale or mortgage of registered land, 93.

**ADVERSE CLAIMS**, how registered, 106.
fee for registering, 110.

**ADVERSE POSSESSION**, not to run against registered land, 46.

**AFFIDAVIT**, of adverse claim, 106.
of sale under foreclosure to be registered, 63.

**AGENT**, required for foreign owner, 22.
appointed by court, compensation of, 33.

**AGREEMENT**, registration is, running with registered land, 45.

**AMENDMENTS**, what and how allowed, 23.
terms of allowance, 23.
as affecting attachments, 76.
to certificates, 108.

**ANSWER**, in appealed cases in superior court, 14.
when filed, by whom, and what shall contain, 34.

**APPEAL**, from court of registration, 14.
decision on, certified to recorder, 15.
if not prosecuted original decree to stand, 16.

**APPEARANCE**, in superior court in appeal cases, 14.
in court of registration, when to be made, 34.
effect of entering, 36.

**APPLICATION FOR REGISTRATION**, a proceeding *in rem* against the land, 2.
by whom made, 19.
by corporations, how made, 19.
by married woman, how made, 19.
by persons having power of appointment, 19.
assent of mortgagee to be obtained, 19.

**APPLICATION FOR REGISTRATION** — *Concluded.*
where filed, 20.
what it shall contain, 21.
form of, 21.
by non-resident, 22.
amendments to, 23.
how much land included, 24.
if land bounded on a way, 25.
to be accompanied by plan, 26.
to be accompanied by title deeds, 26.
if subject to a mortgage, 27.
by rule of court additional facts to be stated, 28.
while pending, land how dealt with, 29.
reference of, to examiner, 30.
report on, by examiner, 30.
answer to, by objectors, 34.
order of court dismissing, 37.
may be withdrawn, 37.
if land in more than one county, 41.
index of, kept by recorder, 49.
trustee may file, 69.
**APPLICATION BOOK**, index of applications, 30.
dealings pending registration, 29.
notice of disposal, 29.
**ASSIGNEE IN INSOLVENCY**, entitled to certificate of debtor's land, 88.
certificate issued to, surrendered when, 89.
order for reconveyance by, to be registered, 89.
**ASSIGNMENT**, of mortgage, how registered, 52.
entered on mortgagee's certificate, 62.
certified copy of, to be filed upon issue of assignee's certificate, 88.
**ASSISTANTS**, of court, how employed, 8.
governor and council fix salaries, 13.
**ASSISTANT RECORDERS**, who are, 10.
sworn before judge and give bond, 11.
may administer oaths, 11.
who act in absence of, 11.
shall keep accurate accounts of all moneys, 11.
governor and council fix salaries, 13.
may receive petitions, 20.
to transcribe copy of decree when received, 41.
how authorized to make registration of voluntary instruments, 55.
how authorized to make registration of involuntary instruments, 71, 72.
refer to court any doubtful question, 53.
conclusive authority to register, 55.
to keep entry book, 56.
duty when there is a conveyance in fee, 57.
duty if grantor retains some land, 58.
duty when a mortgage is presented, 60.
how authorized to discharge mortgage, 62.
duty when a lease is presented, 64.
how to note a trust, 65.
when liable personally, 97.
**ASSURANCE FUND**, how accumulated, 94–100.
action against, 96.
parties to action, 97.
payments, how made from, 98.
deficiency, how made up, 99.

# INDEX

ASSURANCE FUND — *Concluded.*
income, how used, 101.
not liable in case of breach of trust, 102.
damages recoverable, 102.
actions against, to begin within six years, 103.
ATTACHMENT, filed is notice to all persons, 51.
to be noted on entry book, 56.
how made and registered, 71, 73, 74.
to be noted on duplicate certificate, 72.
how reduced, discharged, etc., 52, 73.
same provisions of law apply to registered land, 74.
writ to show attorney's address, 75.
certificates of the action or proceeding of court to be registered, 76.
ATTORNEY, name of to be endorsed on writ making attachment, 75.
powers of to be acknowledged and registered. 104.
ATTORNEY-GENERAL, when notice of application to be given to, 32.
AUTHORITY, voluntary instrument evidence of, to make registration, 50, 55, 61, 62.

BOND, of recorder and assistant recorders, 11.

CANCELLATION, of interests less than estates in fee simple, 52.
of certificates on making new, 57.
CERTIFICATES OF TITLE, recorder may issue, 9.
assistant recorders may issue, 10.
subject to what encumbrances, 39.
originals, transcripts of the decrees, 41.
how made up, 41.
original and subsequent, what are, 42.
to two or more, as tenants in common, 43.
of distinct parcels surrendered for one of all, 44.
of subdivisions of registered land, how obtained, 44.
conclusive evidence of all matters stated, 47.
shall contain what, 48.
new encumbrances, how noted, 52, 106.
new, entered only upon a transfer in fee, 52.
new, not entered unless duplicate is presented, 55.
new, production of duplicate conclusive authority to enter, 55.
forged duplicate null and void, 55.
new, how made, 57.
when grantor sells part of his registered land, 58.
new, after foreclosure of mortgage, 63, 107.
how show a trust, 66.
to new trustee, 67.
to be referred to in lien statement, etc., 71.
new, after a sale on execution, 79.
new, after judgment in a real action, 82.
new, after decree in equity, 85.
new, after judgment in partition, 86.
new, to assignee in insolvency, 88.
new, after insolvency closed, 89.
new, after land taken by eminent domain, 90.
new, after reverter, 91.
new, by descent or devise, 92.
new, by license of probate court, 93.
new, after amendment allowed, 108.
subject of larceny, 111.
*See* "Duplicate Certificate."

**CERTIFIED COPY**, of mortgage, when registered, 27.
of certificate, conclusive evidence, 47.
of certificate, may be obtained at any time, 56.
of trust instrument, when registered, 65.
**CITATION**, form of, 5.
**CLERK OF COURT**, recorder is, and duties, 7.
**COMMONWEALTH**, when to be notified of an application, 32.
bound by decree, 38.
subrogated to rights of plaintiff in suit against, 100.
**CONDITION**, equitable, how registered, 65.
**CONVEYANCE**, in fee, how made, 57.
of portion of registered land, 58.
in mortgage, how made, 60.
by foreclosure of mortgage, how made, 63, 107.
by lease, how made, 64.
in trust, how made, 65.
by right of eminent domain, 90.
by descent and devise, 92.
by license of probate courts, 93.
**COPIES**, of instruments filed duly certified may be obtained, 56.
**CORPORATIONS**, how apply for registration, 19.
**COSTS**, how taxed, 18.
of survey, how taxed, 36.
double, for frivolous claims, 106.
**COUNTY COMMISSIONERS**, to provide rooms for the court, 2.
**COURT OF EQUITY**, decrees, how registered, 85.
**COURT OF LAND REGISTRATION**, jurisdiction of, 2.
sittings of, 2.
always open, 2.
a court of record, 2.
rules and procedure, 2.
how constituted, 3.
sessions, how held, 4.
how enforce its decrees, 17.
not bound by report of examiner, 35.
to prepare forms of certificates, 49.
assistant recorders act under rules of, 57.
may order registered owner to produce his certificate, 72.
may order surrender or cancellation of certificate, 107.
**CURTESY**, a legal incident of registered land, 70.

**DAMAGE**, action in contract for, 96.
when action for, lies against treasurer of Commonwealth, 97.
**DECISIONS**, of court, how appealed from, 14.
final, on appeal to be certified to court of registration, 15.
stand, if appeal not prosecuted, 16.
of court, how enforced, 17.
**DECREE**, affecting registered land to be registered, 85.
court of equity may require registered owner to execute deeds, 85.
may appoint trustee to execute deeds for owner, 85.
**DECREE OF REGISTRATION**, appeals from, 14.
final, to be entered in accordance with certificate of appellate court, 15.
to stand if appeal not prosecuted, 16.
enforced as in equity, 17.
after transcription of, no instruments recorded, 29.
when entered, 35, 38.
dismiss, may be without prejudice, 37.

**DECREE OF REGISTRATION** — *Concluded.*
for registration after hearing, 38.
binds the land and quiets title, 38.
conclusive against all persons, 38.
not to be opened by reason of the disability of any person, 38.
fraudulent, when subject to review, 38.
not opened after transfer for value, 38.
subject to encumbrances named, 39.
dated and signed by recorder, 40.
what to contain, 40.
certified copy of, to be transcribed into registration book, 41.
is an agreement that land shall forever remain registered, 45.
**DEED**, of registered land, form and effect of, 50.
registration the operative act, 50.
filed, is notice to all persons, 51.
what should contain, 54.
may be presented and registered in duplicate, 56.
how registered, 57.
of part of grantor's land, 58.
containing power of sale, power to be stated in certificate, 66.
**DEFAULT**, when entered and whom concluded, 35.
**DEMANDANT**, judgment for, entitled to registration, 82.
when entitled to new certificate, 83.
**DEPUTY SHERIFF**, to attend court, when, 17.
to post notices on land and make return, 32.
**DESCENT AND DEVISE**, on transfer by, new certificate to issue, 92.
**DESCRIPTION OF LAND**, in application for registration, 21, 25.
**DISABILITY**, persons under, how make application, 19.
decree not opened by reason of, 38.
of owner to be stated in decree of registration, 40.
**DISCHARGE**, of mortgage, how effected, 52, 62.
of liens and attachments, how effected, 52-73.
**DISCONTINUANCE**, as to parties to application, 23.
**DOCUMENTS**, recorder has custody, and where kept, 8.
open to public inspection, 56.
**DOCKET**, of court, by whom kept, 7.
**DOWER**, a legal incident of registered lands, 70.
judgment in writ of, to be registered as encumbrance, 84.
**DUPLICATE CERTIFICATE**, issued to owner, 41.
one to each if several owners, 43.
if more than one issued, note on original, 48.
if lost, notice to be given to assistant recorder, 55.
must be presented with all instruments for registration, 55.
surrendered and cancelled on entry of new certificate, 57.
to mortgagee, when, 61.
to lessee, when, 64.
must be brought in for noting involuntary encumbrances, 72.
lost, how replaced, 105.
surrender, how enforced, 107.
penalty for keeping encumbrances from, 115.
**DUPLICATE**, of deeds and other instruments may be registered with originals, 56.

**EASEMENTS**, appurtenant to registered land to remain appurtenant, though not registered till when, 39.
**ELECTION**, to proceed, when, 30.
**EMINENT DOMAIN**, how exercised, 90.
after reversion, certificate issued to reversioner, 91.

**ENCUMBRANCES**, every certificate subject to what, 39.
how entered on certificates, 52.
how carried to new certificate, 59.
how discharged, 52, 62, 73, 76.
memorandum to be entered on certificate, 78.
enforcement of, 78.
judgments in writs of dower to be registered as, 84.
**ENTRY**, for possession, how registered and perfected, 63.
**ENTRY BOOK**, to be kept by assistant recorders, and contents, 56.
**EQUITY**, bill in, how to affect registered land, 80.
certificate of disposal entitled to registration, 81.
decree, how to affect registered land, 85.
**ESTATES**, making up whole title to appear in certificates, 48.
less than fee simple, registered by memorandum, 52.
**EVIDENCE**, conclusive, as to all matters stated in certificate, 47.
recorder's and deputy sheriff's certificate of service conclusive, 32, 109.
**EXAMINERS OF TITLE**, how appointed and removed, 12.
governor and council, fix compensation, 13.
reference of application to immediately, 30.
applicant's election to proceed after adverse opinion of, 31.
court not bound by report of, 35.
may act as master, 36.
when liable personally, 97.
**EXECUTION**, to be filed with assistant recorder and registered, 78.
lien-holder obtaining, may petition court for new certificate, 79.
memorandum of not required, pendency of action having been registered, 80.
against co-defendants only with treasurer of Commonwealth, 98.
**EXECUTOR**, notice to, before issuing new certificate to devisee, 92.
may have license to sell or mortgage registered land, 93.

**FEES**, of recorder and assistant recorders, payable to whom, 11-13.
for attachment, 74.
when eminent domain exercised, who pays, 90.
for assurance fund, 94.
under act, general provisions, 110.
**FEE SIMPLE**, owners of estates in, may apply for registration, 19.
**FORECLOSURE OF MORTGAGE**, same methods of as of unregistered land, 63.
proceedings for cancellation of owner's duplicate certificate, 107.
**FORGERY**, makes certificate null and void, 55.
penalties for, 113, 114.
**FORMS**, of indexes and certificates, 49.
of deeds and other instruments, 50.
**FRAUD**, effect of upon decree, 38.
certificate obtained by, 55.
remedies against parties to, 55.
remedies after original registration, 96, 97.
of registration officials and others, 97.

**GOVERNOR**, appoints judges and recorder, 3.
to draw warrant for amount of execution, 98.
**GOVERNOR AND COUNCIL**, fix salaries, etc., 13.
to advise as to investment of assurance fund, 95.
**GREAT POND**, notice when land borders on, 32.
**GUARDIAN**, application by, 19.
**GUARDIAN AD LITEM**, when appointed and how paid, 33.

**HEIR**, may have new certificate of registered land, 92.
**HIGHWAY**, application to state whether applicant claims land within limits of, 25.
application to state whether applicant desires to have line of determined, 25.
line of, how determined, 32.
decree subject to, if certificate does not determine boundary of, 39.
**HUSBAND OR WIFE**, proceedings for assignment of marital rights under statutes, 86.

**INCIDENTS**, legal, of registered land, 70.
**INDEX**, of applications kept by assistant recorders, 20.
of instruments made pending application, 29.
of recorder's memorandum stating disposition of case, 29.
form of, to be used by assistant recorders, 49.
of applications and decrees to be kept by recorder, 49.
**INFANTS**, application for registration by, 19.
**INFANCY**, decree not opened by reason of, 38.
**INNOCENT PURCHASER**, no right of review against, 38.
his certificate subject only to encumbrances written thereon, 39.
vendor's fraud not to affect, 55.
assumes risk of forged deed and certificate, 55.
amendments to certificates not to affect, 108.
**INSOLVENCY**, assignee in, may recover registered land, 70.
of owner of registered land, 88.
after discharge, new certificate, 89.
**INSTRUMENT**, voluntary, how take effect, 50.
voluntary, shall contain what, 54.
time of reception to be noted, 56.
registration is from time noted, 56.
to be numbered, indexed and endorsed, 56.
voluntary, how registered, 57, 61, 64, 65.
**INTERESTS IN REGISTERED LAND**, less than fee, how registered, 52.
under implied trust, how registered, 68.

**JUDGES**, how appointed, 3.
vacancy, how filled, 6.
appoint title examiners, 12.
salaries of, 13.
may require deputy sheriff to attend sessions, 17.
**JUDGMENT**, on mortgage note not to open foreclosure, when, 63.
notice of, to affect registered land, 80.
final, notice to be registered, 81.
in real action to be registered, 82.
in writ of entry to be registered, 83.
in writ of dower and of waste, 84.
final in partition, 86.
against treasurer of Commonwealth alone, when, 98.
**JURISDICTION**, of court of registration, 2.
of probate courts not impaired, 93.
**JURY TRIAL**, on appeal cases, when, 14.

**LAND**, if bounds on a way, 25.
dealt with, pending application, as before, 29.
when becomes registered land, 29.
bordering on river, sea or great pond, 32.
once registered must so remain, 45.
when sub-divided into lots, plan of, 44.

**LAND** — *Concluded.*
registered, how dealt with, 50.
registered has same legal incidents as unregistered land, 70.
**LAND REGISTRATION OFFICE**, where located and contains what, 8.
**LARCENY**, certificates subject of, 111.
**LEASE**, original or certified copy to be presented for registration, 27.
certificates subject to, for less than seven years, 39.
for more than seven years to be registered, 50, 64.
registered prior to partition, to be endorsed, 87.
**LIEN**, under laws of the United States, 39.
filed is notice to all persons, 51.
how filed and to contain what, 71.
how noted on owner's duplicate certificate, 72.
how discharged, 52, 73.
how filed against both kinds of land, 77.
how enforced upon registered and unregistered land, 78.
new certificate after sale to satisfy, 79.
on land taken by eminent domain, 90.
**LIMITATION OF ACTION**, for filing writ of review, 38.
for compensation under act, 103.
**LINE OF WAY**, applicant may ask to have it determined, 25.
notice of such request, 32.
**LOSS OF DUPLICATE CERTIFICATE**, notice to be given, 55.
procedure to obtain new, 105.

**MARRIED WOMAN**, when application for registration must have consent of husband, 19.
**MASTER**, examiner may act as, with same authority, 36.
**MAYOR**, when notice of application to be given to, 32.
**MECHANIC'S LIEN**. *See* "Lien."
**MEMORANDA**, affecting title, recorder may make, 9.
assistant recorder may make, 10.
forms of, 49.
of all interests less than a fee, 52.
**MEMORANDUM**, of filing application for registration to be recorded, 20.
of recorder stating disposition of case to be recorded, 29.
of instrument creating interest less than a fee simple, 52.
reference to court, as to the proper form of, 53.
authority for making, 55.
duplicate certificate to be presented for, 55.
of issue of mortgagee's duplicate certificate, 61.
**MINOR**, application by, how made, 19.
court of equity may appoint trustee to execute deed, 85.
**MONEYS**, received by recorder and assistant recorders, how kept and paid, 11-13.
**MORTGAGE**, consent of mortgagee to mortgagor's application, 19.
decree in case such consent be not given, 19.
to which application or decree is subject, 27.
to be presented for registration, 27.
when certified copy may be presented for registration, 27.
registration the operative act, 50.
filed is notice to all persons, 51.
should contain what, 54.
may be registered in duplicate and one taken away, 56
how dealt with, 60.
takes effect from time of registration, 60.
how registered, 61.
mortgagee's duplicate certificate, 61.

MORTGAGE — *Concluded.*
how assigned and discharged, 62.
how foreclosed, 63.
bill to set aside foreclosure sale, 63.
of land held in trust, 66.
on land partitioned, 87.
foreclosed, surrender of owner's duplicate, how enforced, 107.
if improperly foreclosed assurance fund not liable, 102.
MOTION, for general default, 35.
to set down case for hearing, 36.
MUNIMENTS OF TITLE, to accompany application, 26.
when may be withdrawn, 26.

NAME, of grantee in every deed to be endorsed thereon, 54.
NEGLIGENCE, one without, may sue for loss, etc., 96.
of registration officials, remedy for, 97.
NOTICE, of court, returnable as court may direct, 2.
of court, form of, 5.
of filing application to be recorded, 20.
to petitioner of filing title report, 30.
of application, to whom addressed, 31.
of application, how and when published, 31.
form of, 31.
of application, on whom and when served, 32.
to mayor or selectmen when line of public way to be determined, 32.
to attorney-general when land borders on navigable river or shore, etc., 32.
recorder's certificate of service conclusive, 32.
of application, court may order additional, 32.
of disposal of application, to be recorded, 29.
to all persons, every filed instrument to be, 51.
to registered owner, how served, 54.
to registered owner to produce duplicate certificate, 72.
of pending suit, etc., 80.
of issuing new certificate to heirs and devisees, 92.
after original registration, how served, 109.

OATH, assistant recorders may administer, 11.
by applicants for registration, 21.
form of, 21.
to amendments of application, 23.
OCCUPANTS, of adjoining land, to be named in application, 21.
of adjoining land, to be named in citation, 31.
OPERATIVE ACT, what is, to convey registered land, 50.
ORDERS OF COURT, run where and where returnable, 2.
forms of, 5.
appeal from, 14.
stand if appeal not prosecuted, 16.
how enforced, 17.
OWNERS, of adjoining land to be named in application, 21.
of adjoining land to be named in citation, 31.
of registered land may convey, mortgage, lease, etc., 50.
OWNER'S DUPLICATE CERTIFICATE, what is and who entitled to, 41.
to have memorandum of what, 52.
noted with all interests less than fee, 52.
to be presented, when, 55.
to be produced by order of court, 72.
if lost, remedy, 105.
surrender of, how enforced, 107.

**PARTITION**, memorandum of suit, to be registered, 80.
final judgment, how registered, 86.
memorandum of to be endorsed on mortgage or lease, 87.
**PENALTY**, for taking certificate wrongfully, 111.
for false oath, 112.
for mutilating records, 113.
for forgery, 114.
for conveying land subject to encumbrance not registered, etc., 115.
**PERJURY**, any false oath required by act, 112.
**PETITION**. *See* "Application."
**PLAN**, should accompany application, 26.
may be required by court, 36.
of subdivision of land, how approved, 44.
**POST-OFFICE ADDRESS**, of grantee to be endorsed on deed, 54.
any change of, to be endorsed, 54.
**POSSESSION, ADVERSE**, no title by, acquired in registered land, 46.
**POWERS**, how registered and noted, 66.
of attorney, form of, 104.
**PRACTICE OF COURT**, like probate courts, 2.
**PRESCRIPTION**, no rights by, as against registered land, 46.
**PROCESSES OF COURT**, where returnable, 2.
form of, 5.
how enforced, 17.
how served on foreign applicant, 22.
to compel production of certificate, 72, 107.
**PROOF OF SERVICE OF NOTICES**, by recorder and deputy sheriffs, 32, 109.
**PUBLIC WAY**, land bounded on, 25.

**QUESTIONS OF LAW**, taken to supreme judicial court, 14.
may be reported by court to supreme judicial court, 14.
**QUIETING TITLE**, decrees, how registered, 85.

**RECORDER**, by whom appointed, and duties, 7, 11.
acts under direction of court, 8.
may employ assistants, 8.
may act in any county, 9.
has direction of registers of deeds, 10.
pays fees quarterly to state treasurer, 11.
salary fixed by the governor and council, 13.
to send to register notice of disposal, 29.
to give petitioner notice of report of examiner, 30.
to publish notice of application, when, 31.
to mail notices to whom, 32.
certificate of service conclusive evidence, 32, 109.
duties when a case is closed, 41.
to keep indexes of applications and decrees, 49.
to prepare forms for assistant recorders, 49.
pays over assurance fund to state treasurer, 95.
when liable personally, 97.
**RECORDS**, open to public inspection, 56.
**REGISTERED LAND**, to remain subject to legal incidents, 70.
**REGISTERS OF DEEDS**, official designation of, and duties, 10.
**REGISTRATION**, a proceeding *in rem*, 2.
who may apply for, 19, 69.
decree for, when entered, 35, 38.
decree for, conclusive against all persons, 38.

REGISTRATION — *Concluded.*
every decree subject to what, 39.
decree for, how and where transcribed, 41.
the operative act to convey the land, 50.
must be made where, 50.
of interests less than estates in fee simple, 52.
dates from date of reception of instrument, 56.
of voluntary instruments, how made, 57, 61, 64, 65.
of involuntary encumbrances, how made, 71, 72.
REGISTRATION BOOK, what it is, and how kept, 41.
no alteration in, after attestation, except, etc., 108.
RETURN DAY OF NOTICE, not less than twenty or more than sixty days from issue, 32.
REVERSION, of land taken by eminent domain, 91.
REVIEW, granted if fraud shown, and title unchanged, 38.
writ of, effecting registered land, 80.
RIVER, notice when land borders on, 32.
RULES OF COURT, by whom made and approved, 2.
may require additional facts in application, 28.

SALARIES, of officials, how fixed and paid, 13.
SALE, of land, while application pending, 29.
of land, after decree for registration, 57.
power of, to be stated in certificate, 66.
of registered land by license of probate court, 93.
SEA, notice when land borders on, 32.
SEAL, court to have, 2.
to be affixed to all processes, 5.
who affixes it, 7.
to be on certificates, 10.
SELECTMEN, when notice of application to be given to, 32.
SESSIONS OF COURT, different at same time, 3.
SEVERANCE, of application may be ordered, 24.
SHERIFF, may be required by judge to have deputy attend sessions, 17.
or deputy, to post notice on land, 32.
fees for services, 110.
SUBSEQUENT CERTIFICATES, form of, 42.
SUBSTITUTION, of parties, 23.
SUITS, pending, notice of, to be filed and registered, 80.
SUPREME JUDICIAL COURT, to approve rules, 2.
to remove examiners, 12.
appeal to, 14.
report of questions of law to, 14.
clerk to certify to recorder end of appeal, 15.
SUPERIOR COURT, appeal to, 14.
jury trial in, on appealed case, 14.
to certify to governor amount due on execution against assurance fund, 96.
SURRENDER, of owner's duplicate, when conveyance in fee, 57, 63.
of mortgagee's duplicate, when mortgage is discharged, 62.
of duplicate certificates, how enforced by court, 105, 107.
SURVEY, may be ordered by court, 36.
cost of, how taxed and apportioned, 36.
SURVIVAL, of action against assurance fund, 103.

TAXES, certificate of title subject to what, 39.
memorandum of sale for, to be registered, 78.

**TENANTS**, for years to join in application with those having the reversion, 19.
of undivided shares, not to apply separately, 19.
in common, each may have certificate, 43.
**TIME**, of reception of instruments to be noted, 56.
**TORT**, action of, for fraud in procuring decree, 38.
action of, for loss of interest in registered land, 96.
**TRANSCRIPTION**, of decree, no papers recorded after, 29.
**TREASURER OF COMMONWEALTH**, receives moneys quarterly, 11.
pays all salaries and expenses of court, except, etc., 13.
keeps assurance fund invested, 95.
actions against, 97.
to pay executions from assurance fund, 98.
subrogated to all rights of plaintiff against assurance fund, 100.
**TRUST**, how registered, 65.
transfers under, 66.
implied or constructive, how noted, 68.
**TRUSTEE**, by new appointment, new certificate to, 67.
may always petition for registration unless prohibited, 69.
by order of court to release interest, 85.
breach of trust by, not recoverable from assurance fund, 102.

**VACANCY**, in court, how filled, 3.
in office of recorder, how filled, 10.
**VARIANCE**, in certificates, original governs, 41.

**WASTE**, judgment in writ of, may be registered, 84.
**WAYS**, land bounding on, 25.
applicant may ask to have lines of, determined, 32.
certificate subject to what, 39.
**WILL**, how it affects registered land, 50.
memorandum as to probate of, 80.
certified copy to be filed, when, 92.
**WRIT**, of review, when allowed, 38.
of execution, sale under, how registered, 79.
memorandum of, to be registered, 80.
of entry, judgment, how registered, 83.
of dower, judgment, how registered, 84.
of waste, judgment, how registered, 84

# APPENDIX B.

## COPIES OF STATUTES

PROVIDING FOR

JUDICIAL PROCEEDINGS BINDING PERSONS NOTIFIED BY THE PUBLICATION OF A GENERAL DESCRIPTION.

# COPIES OF STATUTES.

## ALABAMA.

CODE, 1896.

SECT. 690. *Publication and Proceedings against Defendants whose Names are Unknown.* — In cases where it is necessary to make any persons defendants to a bill, and the names of all or any of them are unknown to the plaintiff, and cannot be ascertained on diligent inquiry, and he annexes to his bill an affidavit that the names of such persons are unknown, that he has made diligent inquiry to ascertain the same, and that their residence as he believes, is not in this state, proceedings may be had, and a decree rendered against them without naming them; and the register must make publication as in case of non-residents, describing such unknown parties, as near as may be, by the character in which they are sued, and with reference to their title or interest in the subject matter.

SECT. 3165. *Unknown Parties; Notice; Shares paid into Court.* — When it is necessary to make any persons defendants to a bill in chancery or a petition in the probate court filed for the partition of property or for a sale thereof because it cannot be equitably divided, and the names of all or any of such persons are unknown to the complainant or petitioner and cannot be ascertained on diligent inquiry, if the complainant or petitioner shall state in a sworn bill or petition, or in an affidavit thereto annexed, that the names of such persons are unknown, and that he has made diligent inquiry to ascertain the same, proceeding may be had against them without naming them; and the register or judge of probate, as the case may be, must make publication as in case of non-resident defendants, *describing such unknown parties as near as may be by the character in which they are sued, and with reference to their title or interest in the property* sought to be partitioned or to be sold for division of the proceeds. The shares or interest of such unknown parties in the proceeds of any such sale shall be paid into court under such directions as may be ordered by the court, and shall there be retained and paid out to the proper parties when ascertained.

## ARKANSAS.

STATUTES (SANDELS & HILL, 1894).

* SECT. 5418. In cases where one or more of such parties, or the share or quantity of interest of any of the parties, is unknown to the petitioner, or uncertain or contingent, or the ownership of the inheritance shall depend upon an executory device, or the remainder shall be contingent, so that such parties cannot be named, the same shall be so stated in the petition.

SECT. 2851. When the prosecuting attorney for the circuit shall be informed, or have reason to believe, that any real estate within his circuit hath escheated to the state, and such estate shall not have been sold, according to law, within three years after the death of the person last seized, for the payment of the debts of the deceased, he shall file an information, in behalf of the state, in the circuit court of the county in which such estate is situate, setting forth a description of the estate, the name of the person last lawfully seized, the names of the terre-tenants, and persons claiming the estate, if known, and the facts and circumstances in consequence of which such estate is claimed to have escheated, and alleging that, by reason thereof, the state of Arkansas hath right to such estate.

SECT. 2852. Such court shall award and issue a *scire facias* against such person, bodies politic or corporate, as shall be alleged, in such information, to hold, possess or claim such estate, requiring them to appear and show cause why such estate should not be vested in the state, at the next term of the court.

SECT. 2853. Such *scire facias* shall be served fifteen days before the return day thereof; and the court shall make an order setting forth briefly the contents of such information, and *requiring all persons interested in the estate to appear and show cause*, at the next term of the said court, why the same shall not be vested in the state; which order shall be published four weeks in some newspaper as provided in chapter XCVII.

SECT. 2854. All persons, bodies politic and bodies corporate named in such information as terre-tenants or claimants of the estate may appear and plead to such proceeding, and may traverse the facts stated in the information, or the title of the state to the lands and tenements therein mentioned, at any time on or before the third day after the return of the *scire facias;* and any other person claiming an interest in such estate may appear and be made

* This section refers to partition proceedings.

a defendant, and plead, by motion for that purpose in open court, within the time allowed for pleading.

SECT. 2855. If no person shall appear and plead, or appearing, shall refuse to plead with the term, then judgment shall be rendered that the state be seized of the lands and tenements in the information claimed.

SECT. 2859. When any judgment shall be rendered that the state be seized of any real estate, *such judgment* shall contain a description of such estate, and *shall vest the title in the state.*

## CALIFORNIA.

3 DEERINGS' ANNOTATED CODE AND STATUTES.

* SECT. 756. The summons must be directed to all the joint tenants and tenants in common, and all persons having any interest in, or any liens of record by mortgage, judgment, or otherwise upon the property, or upon any particular portion thereof; and *generally, to all persons unknown who have or claim any interest in the property.*

* SECT. 757. If a party having a share or interest is *unknown*, or any one of the known parties reside out of the state, or cannot be found therein, and such fact is made to appear by affidavit, the *summons may be served on such* absent or *unknown party by publication*, as in other cases. When publication is made, the summons, as published, must be accompanied by a brief description of the property which is the subject of the action.

* SECT. 759. The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried, and determined in such action; and when a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court, before the judgment of sale can be made; and where service of the complaint has been made by publication, like proof must be required of the right of the absent or unknown parties before such judgment is rendered; except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves.

SECT. 766. The Court may confirm, change, modify, or set aside the report, and, if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive.

---

* Concerning partition proceedings.

1. (Not material.)

2. On all persons interested in the property, who may be unknown, to whom notice has been given of the action for partition by publication;

3. On all other persons claiming from such parties or persons, or either of them.

## COLORADO.

### Mills' Annotated Statutes.

Sect. 3753. *Proceedings before District Court to restore Records.* — Whenever the public records of any plat or map, or any tax list, assessment-roll, or any public record or writing connected with the assessment and collection of the revenues of such county and of the state, which is required to be kept by the county clerk and recorder of such county in his office, has been or may hereafter be lost or destroyed by fire or otherwise, it shall be the duty of the county attorney of the county in which such loss or destruction has occurred, or shall occur, to file in the district court of such county an information in the name of the people of the state of Colorado, setting forth substantially the fact of such loss or destruction of such public records, or so much thereof as may be desired to be reproduced and re-established or restored, with the circumstances attending the loss or destruction of the same, as near as may be, and thereupon the clerk of such court shall cause such information to be published in full in one or more public newspapers published in such county for the period of four weeks, together with the notice addressed, "*to all whom it may concern*," that the court will, at a term therein designated to be held, not less than four weeks from the first publication of such information and notice, proceed to hear and determine the matters in said information set forth, and will take testimony for the purpose of reproducing, re-establishing or restoring such records as the court shall find to be lost or destroyed. Upon such publication being made, *all persons interested shall be deemed defendants*, and may appear in person or by counsel and be heard touching such proceedings. If the court shall be satisfied that any public record aforesaid has been lost and destroyed, an order to that effect shall be entered of record, and thereupon the court shall proceed to take testimony for the purpose of reproducing, re-establishing or restoring the records so lost or destroyed. The proceedings may be continuous from time to time, whether in term time or not, and orders and decrees shall be made as to each record, map, plat, tax list, (and) assessment-roll, as the case may be, separately. The clerk shall cause all maps, plats, tax lists, assessment-rolls or other records adjudged

by the court to be correct copies of the records lost or destroyed, as often and as soon as they are so adjudged, to be filed in the office of the county recorder, with a certified copy of the order or judgment of the court in the premises attached thereto, and recorded in a book or books to be provided for that purpose; and the said record shall be deemed and taken in all courts and places as a public record, and as a true and correct reproduction of the original record so lost or destroyed: *Provided*, That any tax list or assessment-roll so reproduced and restored, or so much thereof as may be reproduced and restored under the provisions of this section, shall be sufficient authority for the treasurer of such county to collect all taxes contained therein, the same in all respects as if it were the original tax list or assessment-roll, and were made out, certified and delivered to him within the time required by law.

SECT. 3759. *Courts having Equity Jurisdiction have Power to make Inquiry.* — In case of such destruction of records as aforesaid, any and all courts in such county having equity jurisdiction shall have power to inquire into the conditions of any title to or interest in any land in such county, and to make all such orders, judgments and decrees as may be necessary *to determine and establish said title or interest*, legal or equitable, *against all persons, known or unknown*, and all liens existing on such lands, whether by statute, judgment, mortgage, deed of trust, or otherwise.

SECT. 3350. *Unknown and All Persons, how brought in.* — All persons interested in the premises of which partition is sought to be made according to the provisions hereof, whose names are unknown, may be made parties to such petition *by the name and description of unknown owners or proprietors of the premises, or as the unknown heirs of any person who may have been interested in the same.*

SECT. 3351. *Unknown Parties; Guardians; Summons; Publication; Guardian ad litem.* — All persons having such interest as is specified in this chapter in any premises of which partition is sought to be made, or the guardians of such as are under age, who shall not have joined in the petition (and if any person so interested be under age and without guardian the court shall appoint guardian *ad litem* for such minor) shall have notice of such application by summons duly served, which summons shall issue against such persons by the name and description given in the petition; and when the names of persons having any such interest in such premises are unknown, and when parties whose names are known do not reside in this state, or cannot be found, they shall have further notice by advertisement, as provided by law; and after such advertisement the court shall proceed to act in the premises as though

the parties had been duly served with summons, or had been notified by their proper names.

* Sect. 3358. *Confirmation; Judgment.* — If no such cause be shown, the report of the commissioners shall be confirmed and final judgment rendered thereon, which judgment shall be binding and conclusive upon all the parties to the proceedings, and all other persons claiming under them.

## CONNECTICUT.

General Statutes, 1888.

Sect. 945. The several courts, other than courts of probate, and the judges, clerks, and assistant clerks thereof, or any county commissioner, in term time or in vacation, may, except where it is otherwise specially provided by law, make such order as may be deemed reasonable, in regard to the notice which shall be given of the institution or pendency of all complaints, writs of error, and appeals from probate, which may be brought to or pending in any court, when the adverse party or any persons so interested therein that they ought to be made parties thereto, reside out of the state, *or when the names or residences of any such persons in interest are unknown to the party instituting the proceeding; and such notice, having been given and proved, shall be deemed sufficient service and notice;* and the court may proceed to a hearing at the first term, or session, unless otherwise provided by law, or may order further notice as it may deem reasonable.

Sect. 946. The plaintiff in any action for equitable relief, to which it would be necessary to make the executor or administrator of a deceased person, if any, a party, and there be no such executor or administrator, may, if he sets forth in his complaint the interest of such deceased person, make his "*Representatives and creditors,*" without further or other designation or description, parties to such action; or where an action for equitable relief is brought relating to any interest in real estate belonging to or which may be claimed by the widow or heirs of any deceased person, and the plaintiff or his attorney, shall annex to the complaint in such action an affidavit stating that the plaintiff does not know who such widow or heirs or some of them, are, or where they or any of them reside, and shall in the process to such action describe as parties defendant, "*The widow and heirs,*" or, as the case may be, "*The heirs,*" of such deceased person, without further describing the names or residences of any such parties whose names and residences may be

* Concerning partition proceedings.

unknown to him, the court to which such action shall be brought or any judge thereof in vacation may make such order relative to the notice which shall be given as shall be, by such court or judge, deemed reasonable; and such notice having been given according to the order and duly proved, the court may proceed to a hearing of the cause at the first term or session or afterwards, as it shall judge proper, and any executor or administrator who may be appointed or qualified pending such proceedings, or any other person claiming as widow or heir of such deceased person may appear and defend in such action; *and all creditors and representatives of such deceased person shall be forever concluded by the judgment or decree rendered therein.*

## DISTRICT OF COLUMBIA.

30 U. S. STATUTES AT LARGE.

[Chapter 459.]

AN ACT to quiet land titles in the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled that in all cases when the title or claim of any person out of possession of any real estate in the District of Columbia shall be barred by adverse possession, and the title thereto has vested in the party in possession or the party under whom he claims, the party holding a title which has vested by adverse possession may file a bill in equity in the Supreme Court of the District of Columbia, to have his title thereto perfected; and it shall be sufficient for him to state in his petition that he holds the title to such real estate and that the same has vested in him, or those under whom he claims, by adverse possession. And in such action it shall not be necessary to make any person a party defendant, except such persons as may appear to have a claim or title adverse to that of the plaintiff. And upon the trial of such cause proof of the facts showing a title in the plaintiff by adverse possession shall entitle him to a decree of the court declaring his title by adverse possession, and a copy of such decree may be entered of record in the office of the recorder of deeds for said district. And in any such action, service or process may be had, as provided in sections 787, 788 and 789 of the Revised Statutes, relating to the District of Columbia. And if in any case an adverse claimant shall be dead, then the heirs, devisees, or alienees of such person, or those claiming by, through, or under him, if known, shall be made defendants as adverse claimants, and if they be unknown to the plaintiff, then he shall allege in his petition, under oath, that there are, or he verily believes that there are, persons interested in the subject matter of the petition as heirs or

devisees of the deceased, or as claiming by, through, or under him or them, whose names he cannot insert therein because they are unknown to him, and shall describe the interest of such persons and how derived, so far as his knowledge extends, and service of process on such unknown persons shall be had by designating them in the published notice as the unknown heirs, devisees, or alienees of the last known owner or claimant of the title; and when such service shall be had a decree shall be rendered the same as though personal service had been had: *Provided*, the rights of infants, or others under legal disability shall be saved for a period of two years after the removal of their disabilities: *Provided, however*, that the entire period during which such rights shall be preserved shall not exceed twenty-two years from the time such rights accrued either in said claimant or in the person or persons under whom he claims.

## FLORIDA.

### Revised Statutes.

* Sect. 1493. *Form and Contents of the Bill.* — Such bill must be sworn to by one or more of the complainants and shall set forth a description of the lands or premises of which partition is prayed, by metes and bounds or other sufficient description, and shall state according to the best of the knowledge and belief of the complainants the names and places of residence of the several owners, joint tenants, tenants in common, or coparceners or other persons interested in said lands or real estate, the quantity or proportionate share held by each and such other matters, if any, as may be necessary to enable the court to adjudicate fully upon the rights and interests of the parties. But if the names, residence, quantity of interest or proportionate share of any of the owners or claimants of such lands are *unknown* to the complainants then it shall be so stated in such bill and such suit may proceed in the same manner *as though such unknown persons or defendants were named in the bill.*

* Sect. 1495. 3. *Exceptions to Report, and Final Decree.* — Any party in interest may file objections or exceptions to the report of the commissioners within ten days after he shall be notified of the filing of the same; or if he be absent from the state so that notice cannot be given, within thirty days after the same is filed; if no objections or exceptions are filed as aforesaid, or if the court is satisfied, upon the hearing of any such objections or exceptions, that they are not well founded, then the report shall be confirmed, and a final decree shall be entered up *which shall accordingly vest in the respective parties the title to the several parcels or portions of the premises* allotted to them respectively, and shall

* Concerning partition proceedings.

give to each of them the possession of and quiet title to their respective shares, *as against the other parties to the suit*, or those claiming through or under them.

## GEORGIA.

CODE, 1895.

SECT. 4976. *Service by Publication, when.* — Where any non-resident or person unknown claims or owns title to, or interest, present or contingent, in any real or personal property in this state, service on such non-resident or unknown owner or claimant may be made by publication in cases affecting such property where proceedings are brought —

1. To remove a cloud therefrom or quiet title thereto.

2. To cancel or set aside deeds, mortgages, liens, or incumbrances thereon.

3. To establish, enforce, or foreclose liens thereon.

4. To enforce, by decree for specific performance, any contract in reference thereto.

5. To order the partition thereof by division or sale.

6. To make any decree or order in which the subject of the action is real or personal property in this state, in which a non-resident or unknown person has or may have or claims an interest, actual or contingent, and in which the relief demanded consists wholly or in part in excluding him from an interest therein.

7. Where a non-resident or person unknown has or may have or may claim present, future, or contingent interests in any property in this state.

8. And in all cases in which such person may have or claim any interest in any trust estate in this state, and it becomes necessary or proper or advantageous to order a sale of the whole or any part of such property, service upon such non-resident or unknown person may be perfected by publication.

SECT. 4893. *Removing Cloud on Title.* — An instrument which, by itself or in connection with proof of possession by a former occupant, or other extrinsic facts, gives the claimant thereunder an apparent right in or to the property, may constitute a cloud on the title of the true owner, and the latter may proceed to have the same removed upon proof —

1. That he cannot immediately or effectually maintain or protect his rights by any other course or proceeding open to him.

2. That the instrument sought to be cancelled is such as would operate to throw a cloud or suspicion upon his title, and might be vexatiously or injuriously used against him.

3. That he either suffers some present injury by reason of the hostile claim of right, or, though such claim be not asserted adversely or aggressively, he has reason to apprehend that the evidence upon which he relies to impeach or invalidate the same as a claim upon his title may be lost or impaired by lapse of time.

* Sect. 3577. *Duty of Ordinary, Claims.* — The escheator, so soon as he shall obtain possession of the estate as administrator, shall make known to the ordinary of the county the fact that the same has apparently escheated to the state, whereupon the said ordinary shall pass an order requiring the said administrator to advertise, by publication in one or more papers in this and other states, according to the circumstances of each case, notifying *all persons interested as next of kin of such deceased person*, of the facts and date of his death, the amount of the estate, and the pendency of proceedings to escheat the same, which publication shall be continued for six months. If no person shall appear and claim, as heir, within twelve months from the date of the first publication, the ordinary shall pass an order declaring that said property escheated to the state. If any person claims the property alleged to be escheated, the claim shall be interposed and tried as claims at administrators' sales.

## IDAHO.

### Revised Statutes, 1887.

† Sect. 4561. The interests of all persons in the property, whether such persons be known or unknown, must be set forth in the complaint specifically and particularly, as far as known to the plaintiff; and if one or more of the parties, or the share or quantity of interest of any one of the parties, be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory device, or the remainder be a contingent remainder, so that such parties cannot be named, that fact must be set forth in the complaint.

† Sect. 4564. The summons must be directed to all the joint tenants and tenants in common, and all persons having any interest in, or any liens of record by mortgage, judgment, or otherwise upon the property, or upon any particular portion thereof; *and generally, to all persons unknown, who have or claim any interest in the property.*

† Sect. 4565. If a party having a share or interest is unknown,

---

* Relating to proceedings to establish an escheat.

† Relating to partition proceedings.

or any one of the known parties reside out of the territory, or cannot be found therein, and such fact is made to appear by affidavit, *the summons may be served on such absent or unknown party by publication*, as in other cases. When publication is made, the summons, as published, must be accompanied by a brief description of the property which is the subject of the action.

* Sect. 4574. The court may confirm, change, modify or set aside the report, and if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive:

1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or of any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life;

2. On all persons interested in the property, *who may be unknown, to whom notice has been given of the action for partition by publication.*

3. On all other persons claiming from such parties or persons or either of them. And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives, or assigns of such decedent, as if it had been entered before his death.

* Sect. 4595. The conveyances must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who shall have been named as parties in the action, and *against all such parties and persons as were unknown, if the summons were served by publication*, and against all persons claiming under them, or either of them, and against all persons having unrecorded deeds or liens at the commencement of the action.

## ILLINOIS.

2 Starr & Curtiss, page 1469.

Par. 18. *Heir or Next Freeholder to assign Dower.* — It shall be the duty of the heir at law, or other person having the next

* Relating to partition proceedings.

estate of inheritance or freehold in any lands or estate of which any person is entitled to dower, to lay off and assign such dower as soon as practicable after the death of the husband or wife of such person.

PAR. 19. *If Assignment not made within Month, Suit.* — If such heir or other person shall not, within one month next after such death, satisfactorily assign and set over to the surviving husband or wife, dower in and to all lands, tenements and hereditaments whereof by law he or she is or may be dowable, such survivor may sue for and recover the same by petition in chancery, as hereinafter prescribed, against such heir or other person, or any tenant in possession, or any other person claiming right or possession in said estate.

2 STARR & CURTISS, PAGE 1470.

PAR. 20. *Venue; Court.* — The petition may be filed in any court of record of competent jurisdiction in the county where the estate or some part thereof is situated.

PAR. 22. *Petition; Contents.* — The petition shall set forth the nature of the claim, and particularly specify the premises in which dower is claimed, and shall set forth the interests of all parties interested therein so far as the same are known to the petitioner, and shall pray for the assignment of such dower.

PAR. 23. *Petition; Occupants and All Interested to be Parties.* — Every person having any interest in the premises, whether in possession or otherwise, and who is not a petitioner, shall be made a defendant to such petition.

PAR. 24. *Unknown Owners; Unknown Interests.* — When there are any persons interested in the premises whose names are unknown, or the share or quantity of interest of any of the parties is unknown to the petitioner, or where such share or interest shall be uncertain or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be contingent, so that such parties cannot be named, the same shall be so stated in the petition.

PAR. 25. *Description of Unknown Defendants.* — All persons interested in the premises in which dower is claimed, whose names are unknown, may be made parties to such petition *by the name and description of unknown owners of the premises, or as the unknown heirs of any person who may have been interested in the same.*

PAR. 27. *Notice by Publication as in Chancery.* — Unknown owners, or parties in interest, of the premises, and the unknown heirs of any such persons, may be notified by advertisement as in cases in chancery.

PAR. 34. *Decree; Commissioners; Their Oath.* — When the court adjudges that the one entitled thereto recover dower, it shall be so entered of record, together with a description of the land out of which he or she is to be so endowed, and the court shall thereupon appoint three commissioners not connected with any of the parties either by consanguinity or affinity, and entirely disinterested, each of whom shall take the following oath: . . .

PAR. 35. *Division by Commissioners.* — The commissioners shall go upon the premises, and if the same are susceptible of division, without manifest prejudice to the parties in interest, shall set off and allot to the person entitled thereto his or her dower, by metes and bounds, according to quality and quantity, of all the premises described in the order of the court.

PAR. 38. *Report; Approval by Court; Effect; Possession.* — The commissioners shall make report in writing, signed by at least two of them, showing what they have done, and if they have made a division, describing the premises alloted by metes and bounds or other proper description; *and the allotment* so made, if approved by the court, *shall vest in the person entitled thereto an estate in the lands* and tenements *set off* and alloted *to him* or her for and *during his or her natural life;* and the court shall forthwith cause such persons to have possession by writ directed to the sheriff for that purpose.

1 STARR & CURTISS, PAGE 563.

PAR. 7. *Unknown Parties; Affidavit; Notice.* — In all suits in chancery, and suits to obtain title to lands, in any of the courts of this state, *if there be persons interested in the same, whose names are unknown,* it shall be lawful to make such persons parties to such suits or proceedings, *by the name and description of unknown owners, or unknown heirs or devisees of any deceased person, who may have been interested in the subject matter of the suit previous to his or her death;* but in all such cases an affidavit shall be filed by the party desiring to make any unknown person a party, stating that the names of such persons are unknown; and process shall be issued against all parties, by the name and description given as aforesaid; *and notices given by publication,* as is required in this act, *shall be sufficient to authorize the court to hear and determine the suit, as though all parties had been sued by their proper names.*

1 STARR & CURTISS, PAGE 590.

PAR. 43. *Unknown Parties.* — All decrees, orders, judgments and proceedings, made or had with respect to unknown persons, shall have the same effect, and be as binding and conclusive upon them, as though such suit or proceeding had been instituted against them by their proper names.

3 STARR & CURTISS, PAGE 2917.*

*PAR. 7. *Unknown Owners; Contingent Interests.* — When there are any persons interested in the premises whose names are unknown, or the share or quantity of interest of any of the parties is unknown to the petitioner, or where such share or interest shall be uncertain or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be contingent, so that such parties cannot be named, the same shall be so stated in the petition.

PAR. 8. *Unknown Owners; how described.* — All persons interested in the premises of which partition is sought to be made according to the provisions of this chapter, whose names are unknown, may be made parties to such petition *by the name and description of unknown owners of the premises, or as the unknown heirs of any person who may have been interested in the same.*

PAR. 9. *Service as in Chancery.* — The defendants to any such petition shall be summoned in the same manner as defendants in suits in chancery.

PAR. 10. *Notice to Unknown Owners.* — Unknown owners, or parties in interest, of the premises, and the unknown heirs of any such persons, may be notified by advertisement as in cases in chancery.

3 STARR & CURTISS, PAGE 2924.

PAR. 35. *When Owner Unknown.* — If the person entitled to any such estate is unknown, the court may determine whether the estate shall be sold or not, as in case of persons under disability, and in the event of sale, make such order for the protection of the rights of such person, in the same manner, as far as may be, as if the persons were unknown and had appeared.

## INDIANA.

REVISION OF 1894.

SECT. 320. *Notice by Publication.* — The clerk, by order of the court, if in session, or in vacation without such order, shall cause a notice of the pendency of any action, and the term at which the same will stand for trial, to be published for three weeks successively, in some newspaper of general circulation, named by the plaintiff or his attorney, printed in the English language and published in the county (or if none be printed or published therein, then in the county in this state nearest thereto in which any such

* Relating to partition proceedings.

paper may be printed), in either of the following cases shown by affidavit: —

*Fourth:* Where the residence of any defendant, upon diligent inquiry, is unknown.

*Fifth:* Where the name of any defendant is unknown, and he is believed to be a non-resident.

Sect. 2491. *Requisites of Petition; Parties.* — Such petition shall be entitled with the names of the parties, petitioner and defendants, and the court in which pending. If the deceased died intestate, his widow, if any, and his other heirs, shall be made defendants; if he died testate, his widow, if any, and his devisees, shall be made defendants, provided that if he died intestate as to any portion of his real estate, his heirs shall also be made defendants. The holder of every lien on the real estate which the executor or administrator shall have reason to deem invalid or discharged, in whole or in part (except taxes and judgments and mortgages in favor of the state of Indiana), shall be made defendants to every such petition, and may be proceeded against by the name or style by which he or they may be designated in the record or instrument constituting such lien. Any person claiming an interest in or lien upon any of the real estate may also be made a defendant. If the names of any of the heirs or devisees of the deceased be unknown to the petitioner, such fact shall be stated in the petition, *and they may be proceeded against as the unknown heirs or devisees of the deceased.* The petition shall set forth a description of the real estate of the deceased liable to be made assets for the payment of his debts; the title of the decedent therein at his death, and the probable value thereof, exclusive of liens; the amount of the personal estate of the decedent which has come to the possession or knowledge of the executor or administrator; the amount of the claims filed and allowed against the estate; the amount of claims filed and pending against the estate; the particulars of each lien, whether general or special, including taxes accrued at the death of the decedent, and judgments and mortgages, due or owing to the state, upon all or any of the decedent's real estate, appearing and remaining unsatisfied of record, with the amount and date of lien and names of the holders, as the same appears of record. If the decedent shall have died testate, and his will shall contain any provision for the disposition of his estate for the payment different from the manner which the law prescribed in case of intestacy, such provision shall be set forth in the petition. Such petition shall be verified by the oath of the executor or administrator filing the same.

Sect. 2494. *Notice of Petition.* — Whenever any executor or

administrator of any decedent's estate shall have filed in the proper court a petition for the purpose of procuring an order for the sale of real estate, for the purpose of paying the debts of such decedent's estate, that notice of the pendency of the petition and of the time and place of hearing the same shall be served upon the defendants personally at least ten days before the time set for hearing the same, unless it appear from the petition or affidavit filed therewith that the names of the residences of any of them are unknown, or that any of them are non-residents of this state, in which case such notice shall be given by publication for three weeks successively in some public newspaper published in the county in which the administration of the estate is pending, if any be published therein, and if not then in some public newspaper published nearest thereto in this state, at least ten days before the time set for hearing the said petition. The notices herein provided for shall be issued by the clerk of the court, and attested by his signature and the seal of the court.

## IOWA.

### Code, 1897.

Sect. 3538. *Unknown Defendants.* — Where it is necessary to make an unknown person defendant, the petition shall be sworn to, and state what interest such person has or claims to have, how the same was derived or is claimed to have been derived, as definitely as may be, that the name and residence of such person is unknown to plaintiff, and that he had sought diligently to learn the same; thereupon the court or judge thereof shall approve a notice collected from the averments of the petition, which shall contain the name of the plaintiff, a description of the property, and all the allegations of the petition concerning the interest of the unknown person, and the mode of devolution thereof, the relief demanded, the name of the court, and the term at which appearance must be made. Such notice must be entitled in the full name of the plaintiff *against the unknown claimants of the property*, and shall be signed by the plaintiff or his attorney.

Sect. 4228. *When allowed.* — When one or more owners of land, the corners and boundaries of which are lost, destroyed or in dispute, desire to have the same established, they may bring an action in the district court of the county where such loss, destroyed or disputed corners or boundaries, or part thereof, are situated, against the owners of the other tracts which will be affected by the determination or establishment thereof, to have such corners or boundaries ascertained and permanently established. If any pub-

lic road is likely to be affected thereby, the property county shall be made defendant.

SECT. 4229. *Notice.* — Notice of such action shall be given as in other cases, and if the defendants or any of them are non-residents of the state, or unknown, they may be served by publication as is provided by law.

SECT. 4236. *Corners and Boundaries established.* — The corners and boundaries finally established by the court in such proceeding, or on appeal therefrom, shall be binding upon the parties as the corners or boundaries which had been lost, destroyed or in dispute, but if it is found that the boundaries and corners alleged to have been recognized and acquiesced in for ten years have been so recognized and acquiesced in, such recognized boundaries and corners shall be permanently established.

## MAINE.

### REVISED STATUTES.

[1883, chapter 88.]

* SECT. 22. Such judgment is conclusive on all rights of property and possession of all parties and privies to the judgment, including all persons who might have appeared and answered, except as hereinafter provided.

[Freeman's Supplement, page 464; Laws of 1895, chapter 85.]

SECT. 49. A person in possession of real property, having either by himself or those under whom he claims been in uninterrupted possession thereof, for ten years or more, claiming an estate of freehold therein, may file a petition in the Supreme Judicial Court setting forth his estate, stating the source of his title, describing the premises and averring that an apprehension exists that persons named in the petition, *or persons unknown* claiming as heirs, devisees or assigns *or in any other way*, by, through, or under a person or persons named in the petition, claim some right, title or interest in the premises adverse to his said estate; and that such apprehension creates a cloud upon the title and depreciates the market value of his property; and praying that such persons be summoned to show cause why they should not bring an action to try their title to the described premises. If any such supposed claimants are unknown, the petitioner or his attorney shall so allege under oath, but the truth of the allegation shall not after decree filed be denied, for the purpose of defeating the title established

* Relating to partition proceedings.

thereby. Upon such petition the court shall order notice returnable at a term of the supreme judicial court to be held in the county where the real estate described lies. Personal service by copy of the petition and order of notice, shall be made upon all such supposed claimants residing in the state, fourteen days before the return day; and upon all such supposed claimants residing out of the state, service may be made by personal service of copy of the petition and order of notice; by publication for such length of time, in such newspapers or by posting in such public places as the court may direct; or in any or all of these ways at the discretion of the court. If any claimants appear to answer to said petition the procedure shall be the same as is provided by section forty-eight; and if the court upon hearing, finds that the allegations of the petition are true and that notice by publication has been given as ordered, it shall make and enter a decree that all persons named in the petition *and all persons alleged to be unknown, claiming by, through or under persons so named*, and who have not so appeared, *shall be forever debarred and estopped from having or claiming any right or title adverse to the petitioner in the premises described* in the petition; which decree shall within thirty days after it is finally granted be recorded in the registry of deeds for the county where the land lies, and shall be effectual to bar all right, title and interest of all persons whether adults or minors, upon whom notice has been served, personally *or by publication*, as herein provided. The court may in its discretion appoint agents or guardians ad litem, to represent minors or other supposed claimants.

[1895, chapter 80, page 449.]

SECT. 1. When the record title of real estate is encumbered by an undischarged mortgage, and the mortgagor and those having his estate in the premises have been in uninterrupted possession of such real estate for twenty years after the expiration of the time limited in the mortgage for the full performance of the conditions thereof; he or they, or any person having a freehold estate, vested or contingent in possession, reversion or remainder, in the land originally subject to the mortgage or in any undivided or any aliquot part thereof, or any interest therein which may eventually become a freehold estate, or any person who has conveyed such land or any such interest therein with covenants of title or warranty, may apply to the supreme judicial court by petition, setting forth the facts, and asking for a decree as hereinafter provided; and if *after notice to all persons interested* as provided in section four, no evidence is offered of any payment within said twenty years or of any other act within said time, in recognition

of its existence as a valid mortgage, the court upon hearing may enter a decree setting forth such facts and its findings in relation thereto, which decree shall within thirty days be recorded in the proper registry of deeds and thereafter no action at law or proceeding in equity shall be brought by any person to enforce a title under said mortgage.

SECT. 3. When the mortgagor of such an undischarged mortgage and those having his estate in the premises have been in uninterrupted possession of such real estate for twenty years from the date thereof, and it shall appear that such mortgage was not given to secure the payment of a sum of money or a debt, but to secure the mortgagee against some contingent liability assumed or undertaken by him, and that such conditional liability has ceased to exist and that the interests of no person will be prejudiced by the discharge of such mortgage, the mortgagor or those having his estate in the premises, or any of the persons to whom a similar remedy is granted in section one of this act may apply to the supreme judicial court by petition setting forth the facts and asking for a decree as hereinafter provided; and if *after notice to all persons interested* as provided in section four, and upon hearing it shall appear that the liability on account of which such mortgage was given has ceased to exist and that such mortgage ought to be discharged, the court may enter a decree setting forth the facts proved and its findings in relation thereto, which decree shall within thirty days be recorded in the proper registry of deeds and thereafter no action or proceeding in equity shall be brought to enforce a title under said mortgage.

SECT. 4. When it is alleged under oath in the petition that the mortgagees or persons claiming under them are unknown or that their names are unknown, *they may be described generally as claiming by, through or under some person or persons named in the petition* Personal service by copy of the petition and order of notice shall be made upon all such respondents residing in the state fourteen days before the return day; and upon all such respondents residing out of the state, service may be made by personal service of copy of the petition and order of notice; by publication for such length of time, in such newspapers or by posting in such public places as the court may direct; or in any or all of these ways at the discretion of the court.

SECT. 5. Upon the service of such notice in accordance with the order of the court, the court shall have jurisdiction of all persons made respondents in the manner above provided, and shall upon due hearing make such decree upon the petition and as to costs as it shall deem proper.

SECT. 6. The decree of the court, determining the validity, nature or extent of any such incumbrance shall be effectual to bar all the respondents from any claim thereunder contrary to such determination, and such decree so barring said respondents shall have the same force and effect as a release of such claims, executed by the respondents in due form of law. The court may, in its discretion, appoint agents or guardians ad litem to represent minors or other respondents.

## MARYLAND.

### PUBLIC GENERAL LAWS, 1888.

[Article 16.]

SECT. 111. In cases where it is unknown whether such party be living or dead, the bill may be filed against him as if living; and in cases where the party is dead, and it is unknown whether he left any heirs, or if the heirs be unknown, then the bill may describe such unknown heirs as the heirs of the person who, if living, would be the proper party.

SECT. 112. Where it is unknown whether a deceased person who ought to be a party to a bill in chancery, has left any heirs, or if the heirs be unknown, in all such cases, *the bill may describe such unknown persons as the heirs of the person who, if living, would be the proper party;* and the court shall order notice by publication to be given to such persons, according to their description in the bill, and the same proceedings shall be had against them as are had against non-resident defendants named in a bill in chancery; and any decree which may be passed, shall have the same effect against those described as the heirs of a particular person, as if the party whose heirs they are supposed to be were living and a party to such decree; the provisions of this section to apply to all cases, including bills of review, bills of interpleader and supplemental bills.

SECT. 113. Any non-resident, or person proceeded against as a non-resident, may appear and answer before final decree, on such reasonable terms as the court may prescribe.

SECT. 114. In all suits in chancery against non-residents or against persons who may be proceeded against as if they were non-residents, the court may order notice to be given by publication in one or more newspapers, stating the substance and object of the bill or petition, and warning such party to appear on or before the day fixed in such order, and show cause why the relief prayed should not be granted; and such notice shall be published as the court may direct, not less, however, than once a week for four

successive weeks, fifteen days before the day fixed by such order for the appearance of the party.

SECT. 115. Upon application for a renewal of a lease containing a covenant for renewal, where any person or persons interested in the reversion reserved in said lease, and who should be the party or parties to the proceedings, is or are unknown, *it shall be sufficient to* substantially *describe such unknown person* or persons in the bill *as the unknown person or persons interested in said reversion, by, through or under the original lessor or lessors*, naming him or them; and the court shall order notice by publication to be given to such unknown person or persons, according to his or their description in the bill, and the same proceedings shall be had against such unknown person or persons as are had against non-resident defendants named in a bill in chancery; and any decree which may be passed shall have the same effect against such unknown person or persons, whether claiming by descent, purchase or in any other manner, and against his or their heirs, executors or administrators and assigns, as if such unknown person or persons had been made a defendant or defendants by name in said bill.

## MASSACHUSETTS.

ST. 1885, c. 283.

When the record title of real estate is encumbered by an undischarged mortgage, and the mortgagor and those having his estate in the premises have been in uninterrupted possession of such real estate for twenty years from the date thereof, and it shall appear that such mortgage was not given to secure the payment of a sum of money or a debt, but to secure the mortgagee against some contingent liability assumed or undertaken by him, and that such contingent liability has ceased to exist and that the interests of no person will be prejudiced by the discharge of such mortgage, the mortgagor, or those having his estate in the premises, may apply to the supreme judicial court by petition, setting forth the facts and asking for a decree as hereinafter provided; and if after notice to all persons interested, by publication or otherwise as the court may order, it shall appear that the liability on account of which such mortgage was given has ceased to exist, and that such mortgage ought to be discharged, the court may enter a decree, setting forth the facts proved, and its findings in relation thereto, which decree shall within thirty days be recorded in the proper registry of deeds, and thereafter no action shall be brought to enforce a title under said mortgage.

St. 1889, c. 442.

Sect. 1. When the title to land appears of record to be affected by a possible condition, restriction, reservation, stipulation or agreement made or imposed more than thirty years prior to the commencement of the proceedings hereinafter provided for, any person having a freehold estate, vested or contingent, in possession, reversion or remainder, in said land, or in any undivided or any aliquot part thereof, or any interest therein which may eventually become a freehold estate, and any person who has conveyed such estate or any such interest therein with covenants of title or warranty, may file a petition in the supreme judicial court for the purpose of determining the validity or defining the nature and extent of such possible condition, or other encumbrance, against any person who might be entitled in any event to claim to set up the same or to enforce or avail himself thereof. Two or more such defects of the same general character in a title to the same parcel of land or to different portions of the same parcel of land may be set forth in the same petition and in case of a contest the court shall make such order for separate issues as may be proper.

Sect. 2. When it is averred in the petition that there are necessary or proper respondents whose names are unknown to the petitioner, proceedings may be had against such respondents by a general description of them, as the heirs or devisees of the person deceased, as persons claiming under certain persons named or described as the owners of certain lands or otherwise. When the precise name of any respondent cannot be ascertained, he may be described as accurately as practicable; and when it is averred that there are classes of necessary or proper respondents whom it is impracticable and unnecessary to name and to have served with process individually such respondents may be proceeded against by general description. The court may, by amendment, in any case when in its opinion the petitioner can and should do so, require him to name or describe respondents more particularly. The foregoing facts shall be set forth on oath in the petition.

Sect. 3. Such notice shall be given to non-resident respondents, to respondents whose residences are unknown, to unknown or unnamed respondents and to any other respondents upon whom for any reason service cannot be made under existing provisions of law as the court shall deem proper. If there are respondents to be affected by a decree of the court, who appear not to have had actual notice of the petition, the court shall appoint some disinterested party to act as agent for them.

SECT. 4. Upon the service of such notice in accordance with the order of the court, the court shall have jurisdiction of all persons made respondents to the petition in the manner above provided, and shall upon due hearing make such decree upon the petition and as to costs as it shall deem proper.

SECT. 5. The decree of the court, determining the validity, nature or extent of any such possible condition or other encumbrance shall be effectual to exclude all the respondents from any claim thereunder contrary to such determination, and the decree of the court, excluding respondents from any claim thereunder, shall have the same force and effect as a release of such claims executed by the respondents in due form of law.

ST. 1893, c. 340.

SECT. 1. When the record title of real property is clouded by an adverse claim, or by the possibility of such claim, any person in possession of such real estate claiming an estate of freehold therein or an unexpired term of not less than ten years, and any person, who, by force of the covenants in any deed or otherwise, may be liable to damages if such claim should be sustained, may file a petition in the supreme judicial court setting forth his interest, describing the premises, the claims and the possible adverse claimants so far as known to him and praying that such claimants may be summoned to show cause why they should not bring an action to try such claim. Where no better description can be given a general description, as the heirs of A. B., or the like, shall suffice. A person who is in the enjoyment of an easement shall be held to be in possession of real property, within the meaning and for the purposes of this section.

SECT. 2. Upon such petition the court shall order notice to be given by publication to the supposed claimants, whether residents or non-residents of this Commonwealth, which notice shall bind all the world, but the court may also require personal or other notice, and if, upon return of the order of notice duly executed, the parties notified do not appear within the time limited, or having appeared, disobey the lawful order of the court to try their claim, the court shall enter a decree that they be forever debarred and estopped from having or enforcing any such claim adversely to the petitioner, or his heirs and assigns, in the premises described.

SECT. 3. Two or more persons owning separate and distinct parcels of land in the same county and holding under the same source of title, may join in a petition against the same supposed claimants, as may also persons owning separate and distinct interests in the same parcel or parcels. If the petitioner prefers, and the supposed claimants are residents of this Commonwealth,

the petition may be inserted like a declaration in a writ, and served by a copy, like a writ of original summons. If the persons notified or summoned appear and disclaim all right and title adverse to the petitioner they shall recover their costs. If they claim title they shall by answer show why they should not be required to bring a suit and try such title; and the court shall make such decree respecting the bringing and prosecuting of such suit as may seem equitable and just. When any judgment or decree shall be rendered for a conveyance, release or acquittance in any court of this Commonwealth, and the party or parties against whom the judgment or decree shall be rendered do not comply therewith within the time mentioned in said judgment or decree, such judgment or decree shall have the same operation and effect and be available as if the conveyance, release or acquittance had been executed conformably to such judgment or decree, subject to the provisions of the fourth section.

Sect. 4. A party against whom a judgment or decree has been rendered hereunder without other service than by publication in a newspaper and whose right is barred by such judgment or decree, shall have a right as against the party or parties in whose favor such judgment or decree was entered, or their heirs or devisees, to recover the value at the time he may bring suit, excepting any improvements of any interest or right of which he may have been deprived by such judgment or decree: *provided*, he might but for such judgment or decree have been able under the statute of limitations then in force to maintain at the date of bringing such suit an action for the recovery of such interest or the enforcement of such right. The court if, because of substantial reasons existing for believing that there are bona fide claimants in existence or for other special cause, it deems justice so demands, may in its judgment or decree require the giving of a bond to respond to any such suit brought within five years from such judgment or decree.

Sect. 5. Chapter one hundred and seventy-six of the Public Statutes is hereby repealed.

Sect. 6. This act shall not affect any proceeding begun under said chapter one hundred and seventy-six prior to the taking effect of this act.

Sect. 7. This act shall not apply to any property, right, title or interest of the Commonwealth.

St. 1897, c. 522.

Sect. 1 (*as amended by St. 1898, c. 457, and St. 1899, c. 444*). In any suit in equity brought in the supreme judicial court or in the superior court, in order to quiet or establish the title to real

estate situated within this Commonwealth, or to remove a cloud from the title to such real estate, in which suit is sought to determine the claims or rights of any person or persons who are unascertained, not in being, unknown, or out of the Commonwealth, or who for any reason cannot be actually served with process and made personally amenable to the decree of the court, such person or persons may be made parties defendant, and if they are unascertained, not in being, or unknown, general words of description, such as the heirs or legal representatives of A B, or such persons as shall become heirs, devisees or appointees of C D, a living person or persons claiming under A B, shall suffice. It shall not be necessary for the maintenance of such suit that the parties defendant shall have a claim or the possibility of a claim resting upon an instrument the cancellation or surrender of which would afford the relief desired; but it shall be sufficient that the parties defendant claim or may claim by purchase, descent or otherwise, some right, title, interest or estate in the land which is the subject of the suit which claim cannot be met by the plaintiffs without the production of evidence or which claim depends upon the construction of a written instrument. Two or more persons claiming to own separate and distinct parcels of land in the same county by titles derived from a common source may join as parties plaintiff in any suit brought under this act.

SECT. 2. If in any such suit it shall appear that there is, or may be, any person who has been made a party defendant under the preceding section, on whom actual service cannot be or has not been made, the court at the request of the plaintiff may order notice of the suit, in such form as it may direct, to be posted in a conspicuous place on the premises, and may also order a general notice to be published in such newspaper or newspapers within or without the Commonwealth, or both, or in such other manner as the court considers most effectual and may also, in its discretion, require personal notice to be given to any party who can be reached thereby, and notice given in accordance with this section shall be deemed constructive service on all parties defendant whether they can be actually served with process or not.

SECT. 3. If after notice has been given or served as provided in section two, and the time limited in such notice for the appearance of parties defendant has expired it shall appear to the court that there are or may be parties defendant who have not been actually served with process within the Commonwealth and who have not appeared in the suit, the court may of its own motion or on the representation of any party appoint a suitable person to appear and act as guardian ad litem or next friend of any such party or parties defendant, and if there are or may be any such

parties defendant who have conflicting interests the court may appoint different guardians ad litem or next friends to represent them.

SECT. 4. The cost of appearance of any such guardian ad litem or next friend, including the compensation of his council, shall be determined by the court and paid by the plaintiff, and execution against the plaintiff may issue therefor in the name of the guardian ad litem or next friend.

SECT. 5. After all parties defendant have been either served with process or notified as provided in section two, and after the appointment of a guardian ad litem or next friend, if any such appointment shall be deemed necessary or proper, as provided in section three, the court in which such suit is pending may proceed therein as though all the parties defendant had been actually served with process. Such suit shall be deemed to be a proceeding in rem against the land, and a decree establishing or declaring the validity, nature or extent of the plaintiff's title may be entered, which decree shall operate directly on the land and shall have the force of a release made by or on behalf of all parties defendant of all claims inconsistent with the title established or declared thereby. But nothing herein contained shall prevent the court from also exercising its ordinary jurisdiction *in personam* against parties defendant who have actually been served with process and who are personally amenable to its decrees.

## MICHIGAN.

HOWELL'S ANNOTATED STATUTES, 1882

* SECT. 7860. If any parties having an interest in such lands are unknown, or if either of the known parties reside out of this state, or cannot be found therein, and such facts be made to appear to the court by affidavit, an order may be made by the court containing a sufficient description of the premises whereof partition is sought, and *requiring all parties interested* to appear and answer the bill by a day in such order to be specified, which order shall be served personally, or shall be published once in each week successively in such paper as may be designated in such order, and for such time as the court shall designate, not exceeding three months.

* SECT. 7861. The proof of personal service or of the publication of such order, shall authorize an order of the court for taking the bill as confessed against all such unknown parties, and persons not resident in this state, or not found therein, as shall not appear and answer by the day mentioned in the order, or on such further day as the court may appoint; and all such unknown parties as

* Relating to partition proceedings.

may appear, shall be entitled to be made parties to the suit, and the bill may be amended accordingly.

* SECT. 7880. Upon the confirmation of the report of any commissioners by the court, a decree shall thereupon be entered, that such partition shall be firm and effectual forever, and such decree shall be binding and conclusive.

1. On all parties named therein, and their legal representatives, who shall, at the time, have any interest in the premises divided, as owners in fee, or as tenants for years, or as entitled to the reversion, remainder or inheritance of such premises, after the termination of any particular estate therein; or who, by any contingency contained in any will or grant, or otherwise, may be or become entitled to any beneficial interest in the premises; or who shall have any interest in any undivided share of the premises as tenant for years, for life, by the curtesy, or in dower.

2. On all persons interested in the premises, *who may be unknown*, to whom notice shall have been given by personal service, or by publishing the same as is hereinbefore directed; and,

3. On all other persons claiming from such parties or persons, or either of them.

SECT. 6744. That in all suits and proceedings in chancery, if there be persons interested in the same, as heirs of some person or persons deceased, whose names are unknown, it shall be lawful to make such unknown heirs parties defendant to such suit or proceeding *by the name and description of unknown heirs of such deceased person*. In all such cases an affidavit shall, at the time of the filing of the bill of complaint or petition, be made and filed in the office of the register in chancery of the county wherein said suit or proceeding is brought by the complainant, his agent, or solicitor, stating the name of the deceased person whose heirs are unknown, and that the names of such heirs are unknown to affiant. And if it shall appear to the satisfaction of the court, or the judge thereof, or a circuit court commissioner of the county where said suit or proceeding is brought, that such unknown heirs are necessary or proper parties to the suit or proceeding, an order shall be made by the court judge thereof, or circuit commissioner, as the case may be, for the appearance of such unknown heirs in said suit or proceedings, on or before a future day specified in said order: *Provided, however*, that said day shall not be less than six months from the date of the order.

SECT. 6745. All subsequent proceedings, including publication of said order shall be taken in the same manner and with like effect as though the names of said heirs were known, but they were non-

* Relating to partition proceedings.

residents of this state, and such proceedings shall be in conformity with the statute relating to non-resident defendants: *Provided*, that the rights of infants, insane persons, idiots, married women, or other persons, under legal disability, shall not be affected or concluded by any proceedings under this act until the expiration of seven years after such disability shall have been removed.

Sect. 6746. Any person made a defendant in any proceeding or suit in chancery as an unknown heir, and who desires to appear in said suit or proceeding may, upon filing an affidavit in the office of the register in chancery of the county where said suit is pending that he is one of the heirs of the deceased person named in the bill of complaint, and has an interest in the proceeding or suit, enter an order of course in said suit or proceeding that said suit shall, as far as he is concerned, proceed against him in his proper name as a co-defendant with the remaining unknown heirs, and upon service of a copy of said affidavit, and notice of the entry of said order, upon the complainant or his solicitor, together with notice of the entry of the usual order of appearance, then said cause shall from that time proceed as in all other causes in chancery.

## MINNESOTA.

Statutes, 1894.

Sect. 5839. *Proceedings against Unknown Heirs.* — That when the heirs of a deceased person are proper parties defendant to any action relating to real property in this state, and when the names and residences of such heirs are unknown, such heirs may be proceeded against under the name and title of "*the unknown heirs" of the deceased.*

Sect. 5840. *Same; Publication of Summons.* — Upon presenting an affidavit to the court or judge, showing to his satisfaction that the heirs of such deceased person are proper parties to the action, and that their names and residences cannot with use of reasonable diligence be ascertained, such court or judge may grant an order that service of the summons in such action be made on such "*unknown heirs*" by publication thereof in the same manner as in actions against non-resident defendants.

Sect. 5841. *Same; Effect of Judgments and Decrees.* — Any order, judgment or decree made or rendered in any such case shall be valid and binding on such unknown heirs, whether they be of age or minors.

Sect. 5842. *Same; Such Heirs admitted to defend after Judgment; Minors.* — Such heirs may, on application to the court, and on sufficient cause shown, be allowed to defend such action, at any time within one year after the rendition of judgment thereon:

*Provided*, that if it shall appear that such heirs were minors at the time such judgment was rendered, they may be allowed to defend the action at any time within two years from the day of their becoming of age.

Sect. 5817. *Action to determine Adverse Claims.* — An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein, or lien upon the same, adverse to him, for the purpose of determining such adverse claim, estate, lien or interest; and any person having or claiming title to vacant or unoccupied real estate may bring an action against any person claiming an estate or interest therein adverse to him, for the purpose of determining such adverse claim, and the rights of the parties respectively.

Sect. 5818. *Same; Unknown Parties.* — That, in any action brought to determine any adverse claim, estate, lien, or interest in real property, under section two of chapter seventy-five of the general statutes, A.D. 1878, the plaintiff may include as defendant in such action, and insert in the title thereof, in addition to the names of such persons or parties as appear of record to have, and other persons or parties who are known to have, some title, claim, estate, lien, or interest in the lands in controversy, the following, viz.: "*Also all other persons or parties unknown, claiming any right, title, estate, lien or interest in the real estate described in the complaint herein.*" And service of the summons may be had upon all such unknown persons or parties defendant, by publication, as provided by law in case of non-resident defendants. And all such unknown persons or parties so served shall have the same rights as are provided by law in case of all the other defendants upon whom service is made by publication, and the action shall proceed against such unknown persons or parties in the same manner as against the defendants who are named, upon whom service is made by publication, and with like effect; *and any such unknown persons* or parties who have or claim any right, estate, lien or interest in the said property in controversy, at the time of the commencement of the action, duly served as aforesaid, *shall be bound and concluded by the judgment in such case*, if the same is in favor of the plaintiff therein, as effectually as if the action was brought against such defendant by his or her name, and personal service of the summons obtained; *provided, however*, that such judgment shall not bind such unknown persons or parties defendants, unless the plaintiff shall file a notice of *lis pendens* in the office of register of deeds, as provided by law, before commencing the publication of said summons, and a copy of said notice of *lis pendens* be printed and published with said summons, and following next

thereafter in the columns of the newspaper wherein said summons is printed and published.

* SECT. 5771. *Summons, to whom addressed.* — The summons shall be addressed by name to all the owners and lien holders who are known *and generally to all persons unknown, having or claiming an interest in the property.*

## MISSISSIPPI.

ANNOTATED CODE (THOMPSON, DILLARD & CAMPBELL).

SECT. 498. *Proceedings to confirm Tax Titles.* — Any person holding or claiming, under a tax title, lands heretofore or hereafter sold for taxes, when the period for redemption has expired, may proceed by bill in the chancery court, to have such title confirmed and quieted, and shall set forth in his bill his claim under the tax sale, and the names and places of residence of all persons interested in the land, so far as known to complainant, or as he can ascertain by diligent inquiry; and where the names of persons in interest or their places of residence are unknown, and have not been ascertained by diligent inquiry, the bill shall so state, and shall in all cases be sworn to; and where the names and places of residence of persons in interest are given, they shall be made parties defendant; and where the bill shall show that the persons interested are unknown to complainant, and that he has made diligent inquiry for their names and could not obtain them, all persons interested may be made defendants by a notice addressed: "*To all persons having or claiming any interest in the following described land, sold for taxes on day of A.D. namely:* (describing land as described in the tax collector's conveyance)"; and the notice shall state the nature of the suit, and require the appearance of all parties in interest on the return day, not to be less than two months from the date of the first publication of notice; and the notice shall be published for three weeks in a public newspaper of the county in which the court is held, if there be one; and where there is no newspaper in the county, the notice shall be posted at the court house door of the county, and published for three weeks in a public newspaper in an adjoining county or at the seat of government of the state. And it shall be lawful in all cases to set forth in the bill the names of all persons interested, as far as ascertained, and make them parties, and also to join and make defendants "*all persons having or claiming any legal or equitable interest in*" *the lands described in the bill.* Such suits shall be proceeded with as other cases; and if the bill be taken for confessed, or if it appear that complainant is entitled to a

* Relating to partition proceedings.

decree, it shall be rendered, confirming the tax title against all persons claiming to hold the lands by title existing at the time of the sale for taxes; *and such decree shall vest in the complainant, without any conveyance by a master or commissioner, a good and perfect title to said lands; and such decree shall*, in all the courts of this state, *be* held as *conclusive evidence that the title to said land was vested* in the complainant, *as against all persons* claiming the same under title existing prior to the sale for taxes.

SECT. 499. *Any Other Title may be confirmed.* — The owner in possession of any land, or the owner thereof who may be out of possession, if there be no adverse occupancy thereof, may file a bill in the chancery court to have his title confirmed and quieted; and the law for notice, process, proceedings, and practice, as provided for confirming and quieting tax titles shall apply, no matter by what tenure the complainant may hold; and unknown and non-resident parties may be made defendants as they are made defendants to proceedings to confirm tax titles. If on the final hearing of any such suit the court shall be satisfied that the complainant is the real owner of the land, it shall so adjudge, *and its decree shall be conclusive evidence* of title as determined from the date of the decree *as against all parties defendant.*

SECT. 3421. *Non-resident and Unknown Defendants summoned by Publication.* — If a defendant in any proceeding in a chancery court be shown by bill or petition sworn to or by affidavit filed, to be a non-resident of this state, or not to be found therein on diligent inquiry, and the post office of such defendant be stated in the bill, petition or affidavit, or it be therein stated that it is not known to the complainant or petitioner, or, if the affidavit be made by another for him, that such post office is unknown to the affiant, and he believes it is unknown to the complainant or petitioner, the clerk, upon the filing of the bill or petition, account, or other commencement of a proceeding, shall prepare and publish a summons to such party to appear and defend the suit on a rule day or on the first day of a term of the court, sufficiently distant in time to admit of the due publication thereof. The summons shall be in the form following, to wit:

"State of Mississippi.

To (the defendant)

You are commanded to appear before the chancery court of the county of , in said state, on the Monday of A.D. to defend the suit in said court of (and others), wherein you are a defendant. This day of A.D.

Clerk."

Upon proof of publication of such summons for three weeks in some newspaper published in the county, or in a convenient county, or at the seat of government of this state, and of the mailing of a copy of the summons to the defendant at his post office, where that is stated, the defendant may be thereafter proceeded against as if he had been personally served with a summons in the case in this state.

SECT. 3424. *Unknown Heirs and Unknown Defendants.* — When unknown heirs are made parties defendant in any proceeding in the chancery court, upon affidavit that the names of such heirs are unknown, the complainant may have publication of summons for them, and such proceedings shall be had thereupon in all respects as are authorized in the case of non-resident defendants; and when the parties in interest are unknown, and an affidavit of that fact be filed, they may be made parties by publication to them *as unknown parties in interest.*

SECT. 518. *How Unknown Persons may be made Parties.* — When the heirs of a deceased person shall be necessary or proper parties to any suit or proceeding in chancery, and the names of all or any such heirs shall be unknown to the complainant, such of said persons whose names may be unknown, may be described as the "*unknown heirs*" *of the deceased;* and when the parties in interest are unknown they may sued as "*unknown parties in interest.*"

SECT. 1703. *Proceedings to establish Escheats.* — In all cases when property may have escheated to the state, it shall be the duty of the escheator of the county in which said property may be to file in the chancery court a bill in the name of the state to have the escheat judicially declared; the bill shall contain a statement of the name of the last owner, and that he died without heirs, the names of all persons who claim an interest in the property, if any be known, and also a description of the property and who, if any one is in possession, and an averment that the same has escheated to the state for want of heirs.

SECT. 1704. *What Persons summoned; Publication made.* — On the filing of the bill, the clerk shall issue a summons to all persons residing in this state and named in the bill as having or claiming an interest in the property, and also to the person named as being in possession, to appear and answer the same; and he shall give notice, by publication as in other cases, *to all parties, known or unknown, having or claiming an interest in the property,* to appear and answer the bill; which notice shall contain a description of the property, and the name, residence, and place of death of the last owner, if known.

SECT. 1705. *A Claimant not a Party may answer.* — Any person who claims an estate or interest in property, against which proceedings have been instituted to have an escheat judicially declared, though not named in the bill or summoned, may, nevertheless, appear and answer the bill, interposing his title or claim, but shall not recover costs unless it appear that he has some estate or interest in the property, even though the state fail in establishing an escheat.

SECT. 1706. *Proceedings in Court.* — The proceedings shall be conducted as other suits in the chancery court; and, if determined in favor of the state, the court shall decree the property escheated to the state, and thereby the state shall be seized and possessed of the property in law and in fact. The successor of the escheator who filed the bill may appear and conduct the suit without revivor or alteration of the pleadings.

## MISSOURI.

BURNS' ANNOTATED PRACTICE CODE, 1896.

SECT. 468. *Suit to perfect Title by Limitation; Proceedings.* — In all cases, when, under the provisions of the section entitled "Limitation in case of certain equitable titles," of chapter 103 of the revised Statutes of Missouri of 1889, the title or claim of any person out of possession of any real estate shall be barred by limitation, and the title thereto has vested in the party in possession, or the party under whom he claims, under the provisions of said section, the party holding the title which has vested by limitation under the provisions of said section may bring his action in the circuit court of the county in which the real estate is situated, to have his record title thereto perfected, and it shall be sufficient for him to state in his petition that he holds the title to such real estate, and that the same has vested in him or those under whom he claims, by limitation under the provisions of said section, and in such action it shall not be necessary to make any person a party defendant except such persons as may appear to have of record a claim or title adverse to that of plaintiff, and upon the trial of such cause, proof of the facts, showing title in plaintiff by limitation by reason of the provisions of said section, shall entitle him to a decree of the court declaring his title by limitation under the provisions of said section, and a copy of such decree may be entered of record in the office of the recorder of deeds of said county, and in any such action service of process may be had as provided in article 4 of this chapter in causes affecting real estate, and if in any case the person whose adverse claim appears of record shall be

dead, then the heirs or devisees of such person, or those claiming by, through or under him or them, if known, shall be made defendants, as adverse claimants, and if they be unknown to plaintiff, then he shall allege in his petition, under oath, that there are, or that he verily believes there are, persons interested in the subject-matter of the petition as heirs or devisees of deceased, or as claiming by, through or under him or them, whose names he cannot insert therein because they are unknown to him, and shall describe the interests of such persons, and how derived, so far as his knowledge extends, and service of process on such unknown person shall be had as in said article 4 is provided in case of unknown parties, *and when such service shall be had, judgment and decree shall be rendered the same as though personal service had been had.*

SECT. 1364. *Land Titles, Petition to contain What, when Evidence of Title is lost; where filed.* — Any person or persons claiming an estate or interest in any lands or real estate in this state, and whose deeds, mortgages, or other written evidence of title or interest, or the record thereof, have been lost or destroyed, may apply by petition to the circuit court of the county in which the land or any part thereof lies, or the record was destroyed, setting forth in said petition a description of said lands, the nature and extent of his, her or their interest or estate therein, and a description of his or her or their deeds, mortgages or other evidence of title, and give the date and contents of said deeds, mortgages or other written evidence of title, and the name or names of the person or persons who executed the same, and the interest therein conveyed to the said complainant, as fully and particularly as said petitioner shall be able. The said petitioner or petitioners shall also set forth in his, her or their petition the manner in which his, her or their deed or deeds, or other evidence of title in and to the lands described in said petition, were lost and destroyed, and praying the said court to hear and make a record of such evidence as the said petitioner or petitioners shall produce, touching or concerning his, her or their alleged estate or interest in and to said lands, described in his, her or their petition; and upon hearing such testimony and proof of title as is produced by the said petitioner or petitioners, in support of his, her or their interest and estate in and to said lands described in the said petition, the estate or interest of the said petitioner shall be adjudged and determined by the said court, according to the evidence adduced by the said petitioner or petitioners in support of the estate or interest which he, she or they may have in and to the said lands described in the said petition, which said petition shall be verified by the affidavit

of the petitioner or petitioners, or by the affidavit of some person petitioning in his, her or their behalf.

Sect. 1365. *Publication of Notice; Proceedings.* — On the filing of said petition with the clerk of said court, it shall be the duty of said clerk to cause a notice to be published in some public newspaper, published in the county where the cause is pending, and if there be no newspaper published in said county, then in some public newspaper published nearest to the county seat of said county, *addressed to all whom it may concern*, and setting forth the filing of said petition, a description of the lands in said petition described, and the estate or interest claimed therein by said petitioner or petitioners, and that a decree will be entered in said cause at the next term of said court after the due publication of said notice, and the title or interest to or in said land adjudged to said petitioner or petitioners, according to the prayer of said petition; which said notice shall be published once a week for at least four weeks, the last insertion to be at least four weeks prior to the term of said court; and if any person or persons shall be in possession of said lands in the petition described, then a copy of the notice shall be duly served upon such person or persons, at least twenty days previous to said regular term of said court, subsequent to the publication of said notice, as hereinbefore provided; and at the next term of said court after the due publication of said notice, the petitioner or petitioners may produce and submit to the court such evidence and proof of title or interest to or in the said lands in the petition described, as he may be able, and also touching and concerning the loss or destruction of his said deed or other evidence of title in and to the lands; which evidence and proofs shall be taken, and proceedings had, after the form and practice and proceedings in civil cases in said court.

Sect. 1366. *Decree of Court Conclusive as to whom; Prima Facie as to whom.* — Any person who may claim an interest or estate in said lands adverse to that alleged in the said petition or petitions may appear and answer said petition, and resist the claims of said petitioner or petitioners in and to the said lands, and may also produce and submit such evidence and proof of his estate or interest in the said lands, as he, she or they, or any person acting in his, her or their behalf, may desire, conforming in all respects to the same rules of equity as hereinbefore provided for the government of petitioner or petitioners; and if, upon a final hearing of the petition, the court shall find the allegations of said petition to be substantially proved, *it shall order a decree in said cause adjudging said petitioner* or petitioners *to be seized of an interest* and estate *in the said land*, according to the allegations

and prayer of the said petitioner or petitioners, which said decree shall be conclusive against all persons and parties who may appear and answer in said cause, or who shall have been personally served with notice, and shall be prima facie evidence against all other persons claiming said premises from the time of entering of the said decree.

SECT. 1367. *Limitations; Court may modify its Decree, when.* — Any person claiming any estate or interest in said lands adverse to the terms of said decree, who has not been personally served with notice, as is provided in section 8409, or who has not entered his appearance in the cause and answered the petition, as provided in section 8410, may enter his appearance in said cause at any time within two years after the entry of the said decree, and, on his motion, after giving twenty days notice to the said petitioner or petitioners, or any person claiming by, through or under him, her or them, said proceedings shall be open for the purpose of hearing, upon proof duly taken, any claim of title or interest to or in the said lands which may be produced by the person making said motion; and on hearing such motion, and evidence and proof thereupon submitted, the court shall adjudge the ownership and title of said lands according to the evidence adduced, modifying its former decree as the evidence and nature of the cause shall in justice and equity require; and if no motion to open such proceedings shall be made within two years from the entering of such decree, the same shall be conclusive against all persons claiming an estate or interest in the said lands adverse to the rights of its said petitioner, as defined in said decree, except infants, lunatics and married women, who shall be allowed respectively two years after their disability is removed to appear and enter their motion for opening of their proceedings, and to make answer to said petition or petitions.

SECT. 1368. *Copy to be recorded, where; may be read in Evidence.* — A certified copy of any decree entered in pursuance of this article shall be recorded in the office of the recorder of register of deeds of the said county where the lands are situate, and a certified copy of said decree, or of the record thereof, may be read as evidence in all courts and judicial proceedings in this state.

SECT. 400. *Publication against Unknown Parties.* — If any plaintiff shall allege in his petition, under oath, that there are, or that he verily believes there are persons interested in the subject matter of the petition, whose names he cannot insert therein because they are unknown to him, and shall describe the interest of such persons, and how derived, so far as his knowledge extends, the court, or the judge or clerk thereof in vacation, shall make an

order as in case of non-residents, reciting moreover all allegations in relation to the interest of such unknown parties.

SECT. 401. *Orders of Publication to be published, where and how long.* — Every order against non-resident, absent or unknown defendants shall be published in some newspaper published in the county where suit is instituted, if there be a paper published there; if not, then in some paper published in this state, which the plaintiff, or his attorney of record, with the approval of the judge or clerk making the order, may designate as most likely to give notice to the person to be notified; the publication shall be for four weeks successively, published at least once a week, the last insertion to be at least fifteen days before the commencement of the term at which the defendant is required to appear.

SECT. 395. *Orders of Publication.* — In suits in partition, divorce, attachment, suits for the foreclosure of mortgages and deeds of trust, and for the enforcement of mechanics' liens, and all other liens against either real or personal property, and in all actions at law or in equity, which have for their immediate object the enforcement or establishment of any lawful right, claim or demand to or against any real or personal property within the jurisdiction of the court, if the plaintiff or other person for him shall allege in his petition, or at the time of filing same, or at any time thereafter shall file an affidavit stating that part or all of the defendants are non-residents of the state or is a corporation of another state, kingdom or country, and cannot be served in this state in the manner prescribed in this chapter, or have absconded or absented themselves from their usual place of abode in this state, or that they have concealed themselves so that the ordinary process of law cannot be served upon them, the court in which said suit is brought, or in vacation the clerk thereof, shall make an order directed to the non-residents or absentees, notifying them of the commencement of the suit, and stating briefly the object and general nature of the petition, and, in suits in partition, describing the property sought to be partitioned, and requiring such defendant or defendants to appear on a day to be named therein and answer the petition, or that the petition will be taken as confessed. If in any case there shall not be sufficient time to make publication to the first term, the order shall be made returnable to the next term thereafter, that will allow sufficient time for such publication.

* SECT. 1737. *When Name or Interest of a Party is Unknown, what Necessary.* — In case one or more of such parties, or the share or quantity of interest of any of the parties be unknown to the

* Relating to partition proceedings.

petitioner, or be uncertain or contingent, or the ownership or th inheritance shall depend upon an executory devise, or the remain der shall be contingent, so that such parties cannot be named, th same shall be so stated in the petition.

## MONTANA.

2 Code, 1895.

* Sect. 1348. If a party having a share or interest is unknown or any one of the known parties reside out of the state, or canno be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication, as in other cases. When publication is made, the summons, as published, must be accompanied by a general statement of the nature of the action and a brief description of the property which is the subject of the action.

Sect. 1351. When a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court, before the judgment of sale can be made; and where service of the summons has been made by publication, like proof must be required of the right of the absent or unknown parties, before such judgment is rendered; except where there are several unknown parties having an interest in the property, their rights may be considered together in the action, and not as between themselves.

Sect. 1361. The court may confirm, change, modify or set aside the report, and if necessary appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive.

1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life.

2. On all persons interested in the property, who may be unknown, to whom notice has been given of the action for partition by publication.

3. On all other persons claiming from such parties or persons, or either of them.

---

* Relating to partition proceedings.

And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives or assigns of such decedent, as if it had been entered before his death.

## NEBRASKA.

### Compiled Statutes, 1895.

*Statutes allowing Parties to be brought in by a General Citation.*

Sect. 5675. *Unknown Heirs.* — In actions where it shall be necessary to make the heirs or devisees of any deceased person defendants, and it shall appear by the affidavit of the plaintiff annexed to his petition, that the names of such heirs or devisees, or any of them, and their residence are unknown to the plaintiff, *proceedings may be had against such unknown heirs* or devisees, *without naming them*, and the court shall make such order respecting service as may be deemed proper; if service by publication be ordered the publication shall not be less than four weeks.

## NEW HAMPSHIRE.

### Public Statutes.

[Chapter 243.]

Sect. 1. One or more persons, having or holding real estate with others, in possession, reversion, or remainder after an estate of freehold, if the remainder is vested, may have partition thereof as in this chapter provided.

Sect. 2. Petition may be filed by such person in the supreme court in the county in which the estate or any part thereof lies, particularly describing the estate, the names of all owners or persons interested, if known, and the share of the petitioner therein, and praying for partition thereof.

Sect. 3. If the persons interested in any such real estate with the petitioner are unknown, it shall be described in the petition in the same manner as is required in the case of taxing unimproved lands of non-residents, specifying the share held by each petitioner, and stating that it is held with persons unknown.

Sect. 4. The petitioner shall give notice to all persons interested in the estate, by causing the petition and order of notice thereon to be served on each in the same manner that writs of summons are required to be served.

Sect. 5. If any petitionee or his residence is unknown, or if he resides out of the state and has not had personal notice, the

court shall order publication of the petition and order of notic and may fix the time of the last publication.

SECT. 8. If any petitionee is unknown, the court may, in the discretion, appoint an agent to aid and advise in his behalf making the partition.

SECT. 10. If the issue is determined in favor of the petitione or if after notice the petitionee does not appear, or if no sufficie objection is made, the court shall render judgment that partitio be made, and shall appoint a committee, consisting of three suitabl persons, residents of the county, to make partition of the estate to set off the shares of the several petitioners according to thei respective titles, and to award costs as they deem just.

SECT. 11. The committee shall be sworn. They shall appoin a time and place of hearing, and cause notice thereof in writing signed by the chairman, to be served upon each person interested or his agent or attorney, or to be left at his abode, seven days a least before the day of hearing.

SECT. 12. If any petitionee or his residence is unknown, the committee shall cause the notice to be published.

## NEW JERSEY.

PUBLIC LAWS, 1881, PAGE 220.

[Chapter 140, section 1, as amended by chapter 165, section 1.]

SECT. 1. That in all actions heretofore or hereafter commenced in the court of chancery of New Jersey, by bill of complaint affecting or concerning the title to any lands lying in the state of New Jersey, or to foreclose a mortgage, or to establish and enforce any other lien or charge against lands in this state, mentioned and described in said bill, whenever it shall appear by the allegations of said bill of complaint, duly verified by the affidavit of the complainant or his agent or solicitor thereto annexed, that any person mentioned in said bill of complaint as having or having had, claiming, or having claimed, or believed by the complainant to claim or to have claimed, any right, title, interest or estate in or to said lands, or any part thereof, or any mortgage or other lien or charge thereon, or his heirs, devisees or personal representatives, are proper parties defendant to said bill of complaint; and that the complainant, after diligent and careful inquiry therefor, made as in case of absent defendants, has been unable to ascertain whether such person is still alive, or if he is known or believed to be dead, has been unable to ascertain the names and residence of his heirs, devisees or personal representatives, or of such of them as are proper parties defendant as aforesaid, such action may proceed

against such person by name, and his heirs, devisees and personal representatives as in case of absent defendants whose names are known; provided, nevertheless, that such notice as is now required by law to be published against absent defendants in default of personal service, *addressed to such person by name and to "his heirs, devisees and personal representatives," and containing such further statements and giving such further time as the chancellor may by his order direct*, be first published and mailed in such manner as the chancellor may by his order in said action direct; *and in case such person* or his heirs, devisees or personal representatives *shall not appear*, plead, answer or demur within the time limited in said notice, or further allowed by the chancellor, if he shall think proper, on proof to the satisfaction of the chancellor of mailing and publication of said notice, as directed, *such action may proceed* in all respects *as though* such person or his heirs, devisees or personal representatives *had been duly named and described and served with process* of subpœna in said action, and had failed to appear, plead, answer or demur to the complainant's bill of complaint within the time thereto allowed by law.

SECT. 2. That *all such defendants* and all persons falling within the description of "heirs, devisees or personal representatives" of the defendant supposed to be dead, as aforesaid, *shall* thereupon *be bound* by all orders and decrees in said cause, as if they had been duly named and described and served with process within this state.

PUBLIC LAWS, 1893, PAGE 256.

SECT. 1. That in all actions hereafter commenced in the court of chancery of New Jersey, by bill, petition, or otherwise, whenever it shall appear by the allegations of the said bill or petition, duly verified by the affidavit of the complainant or petitioner, or by one of them, if there shall be more than one complainant or petitioner, or his or their agent or solicitor, thereto annexed, that any person mentioned in said bill or petition, or his heirs, devisees or personal representatives, are proper parties defendant to said bill of complaint or said petition; and that the complainant after diligent and careful inquiry therefor, made as in case of absent defendants, has been unable to ascertain whether such person is still alive, or if he is known or believed to be dead, has been unable to ascertain the names and residences of his heirs, devisees or personal representatives, or such of them as may be proper parties defendant as aforesaid, *such action may proceed against such person by name, and his heirs, devisees and personal representatives*, as in the case of absent defendants whose names are known; *provided, nevertheless*, that such notice as is now required by law

to be published against absent defendants in default of perso service, *addressed to such person by name, and to his "hei devisees and personal representatives,"* and containing such furth statements and giving such further time as the chancellor may his order direct be first published and mailed in such manner the chancellor may, by his order in said action, direct; *and in ca such person*, or his heirs, devisees or personal representative *shall not appear*, plead, answer or demur within the time limit in said notice, or further allowed by the chancellor, if he sh think proper, on proof to the satisfaction of the chancellor mailing and publication of said notice as directed; *such acti may proceed* in all respects *as if such person*, or his heirs, devise or personal representatives *had been duly named* and described a *served with process* of subpœna in said action, and had failed plead, answer or demur to the complainant's bill of complaint, petitioner's petition within the time thereto allowed by law.

SECT. 2. That *all such defendants*, and all persons fallin within the description of "heirs, devisees or personal represent tives" of the defendant supposed to be dead as aforesaid, *sha* thereupon *be bound* by all orders and decrees in said cause as they had been duly named and described and served with proces in this state.

## NEW YORK.

### LAWS OF 1890.

[Chapter 503.]

AN ACT to quiet the title to real property in certain cases, con veyed pursuant to judicial decree, which decree has been los or destroyed.

SECT. 1. Whenever real property shall have been conveyed by a sheriff or referee, pursuant to a judicial decree, which decree ha been lost or destroyed, and the defendants (other than lienors o incumbrancers) named in the notice of pendency of the action i which such decree was made, or those who might claim unde them, or either of them, are dead, unknown or their whereabout cannot after diligent inquiry be ascertained, the person who ha been or he and those having his estate who have been, for thirty years in actual possession of such property claiming it in fee unde said sheriff's or referee's deed, which deed shall have been recorde at least thirty years may, maintain a special proceeding *for th purpose of establishing judicially* his or their title to such real prop erty.

SECT. 2. A person or persons, desiring to institute a proceed ing under this act, must present a petition to the supreme court a

a special term to be held in the judicial district in which the real property is situated, setting forth the facts proving to the satisfaction of the court, that the case is one of those specified in the first section of this act, and must describe the property with common certainty, and state what, if any, liens or incumbrances exist thereon, and the names of the persons, if any, besides the petitioners, who have been in the actual possession of the property during the past thirty years claiming title as owners thereof in fee, and how such title was derived, and shall also annex to said petition a duly certified copy of the sheriff's or referee's deed recorded thirty years since under which petitioners claim title.

SECT. 3. Upon the presentation of such petition, duly verified in the manner prescribed for the verification of pleadings by the code of civil procedure, the said court shall make an order for the publication of a *notice requiring all persons claiming any interest in the real property described in such petition* to appear before the court at a special term thereof, to be held at a time and place to be therein specified, not less than three months nor more than six months thereafter, and show cause, if any they have, why they should not be forever barred from maintaining any action or proceeding for the recovery of the real property, which shall be substantially described as set forth in said petition, and which notice shall also contain a reference to the time and place of record of the sheriff's or referee's deed referred to in this act. Said publication shall be made once a week for three months successively prior to the return day named in said notice in two newspapers designated in the order as most likely to give notice to any claimants of the property.

SECT. 4. In case the property described in said sheriff's or referee's deed shall have been subdivided, the owner or owners of the several parcels thereof may unite in the same petition and proceeding provided for by this act.

SECT. 5. Upon the return-day named in said notice the court shall proceed summarily to inquire into the truth of the matters set forth in the petition, and may appoint a referee for that purpose, and if there shall be no appearance by any person claiming any adverse interest to the petitioners in the real property described in the petition the *court may make a final order declaring that the title of the petitioner to such real property has been judicially established*, which final order, together with the petition and order for and proof of publication of the notice, and the proofs taken before the court of referee shall be filed in the office of the clerk of the county in which the real property is situated, *and such final order shall be evidence of the facts so declared to be established thereby in all courts*

*and places*, and thereafter no action or proceeding for the recovery of the real property described in said final order or any part thereof, or of any interest therein, shall be maintained by any person named as a defendant in the notice of pendency of action referred to in the first section of this act, or by any person or persons claiming under such defendant or either of them.

SECT. 6. If any person shall appear on the return day of said notice and claim in writing an interest in the real property adverse to that of the petitioners, stating the nature of his claim and his place of residence, the court may proceed in like manner to inquire into the truth of the facts stated in the petition and may make a final order in like manner and with like effect as above provided, except that such final order shall not affect in any way any person who shall have appeared on the return day and asserted a claim adverse to the petitioners, as herein provided for.

SECT. 7. No such final order shall be made until the petitioners named in said proceedings, or their attorney, shall file in the clerk's office of the county in which such real property is situated a notice of the pendency of the said special proceeding, containing the names of all the persons claiming to be then owners of the property in fee, pursuant to said sheriff's or referee's deed, the object of the proceeding, together with a brief description of said property. Each county clerk with whom such notice is filed must immediately record it in the book kept in his office for recording of notices of pendency of an action, and index it to the name of each person claiming to be owner as aforesaid, and said clerk shall be entitled to receive for his services the same fees therefor as are now allowed by law for filing, recording and indexing a notice of pendency of action.

*Code Civil Procedure, Section 1582, as amended by Laws of 1889, Chapter 39, Laws of 1891, Chapter 365, and Laws of 1893, Chapter 203.*

SECT. 1582. Where a person has been made a defendant as an unknown person, or where the name of a defendant is unknown, or where the summons has been served upon a defendant without the state, or by publication, and he has not appeared in the action, the court must direct his portion to be invested in permanent securities, at interest for his benefit, until claimed by him or his legal representatives; but after the lapse of twenty-five years from the time of the payment into court, or to the treasurer of any county, of any portion of the proceeds of the sale of real property, for unknown heirs, heretofore or hereafter to be made in any action of partition, without any claim therefor having been made by any

person entitled thereto, and upon there being made and presented to the court, at a special term thereof, proof, by petition or otherwise, showing to the satisfaction of the court, that due inquiry for such unknown heirs, or their representatives, has been made and that they cannot be found, and that no claim has been made for such portion of said proceeds by any person entitled thereto, proceedings shall thereupon be taken in said court, and an investigation had therein as to the heirship, death or whereabouts of such unknown heirs or their representatives, and as to the known heirs of the ancestor of such unknown heirs, the next of kin, representatives and distributees of such known heirs, and as to all persons interested in such proceeds, and their respective interests therein, and the said court shall, by an order made in the action, direct that a notice entitled in the action and signed by the petitioner, or his attorney, *and directed to such unknown heirs or their representatives*, and to known heirs, their next of kin, representatives, or distributees, *and all persons interested in such proceeds*, be served upon them by the publication thereof, the same to be published once in each week for six successive weeks in a newspaper published in the county where the action was brought, and in such other newspapers as the court may direct, ordering and requiring such unknown heirs or their representatives, and all known heirs, their next of kin, or representatives, *and all persons interested in such proceeds*, and each of them to be and appear in said court at a special term thereof, at a time and place to be specified in said order and notice, and at least six weeks from the date of the first publication of such notice, to then and there establish their heirship and identity, kinship and interest, and submit any proof, as to such unknown heirs, or their representatives, and the known heirs, their next of kin, representatives or distributees, *and all persons interested* and their interest in such proceeds, they may desire, and that in case of their default in so doing, that the said proceeds will be distributed and paid over to the known heirs of the ancestor from whom such unknown heirs derived title thereto, and to their heirs, next of kin, representatives, distributees and assigns, and they and each of them shall thereafter be forever barred of and from all and every cause or causes of action for such proceeds, or on account thereof, or growing out of the distribution thereof, and of and from all right, title, claim and interest in and to such proceeds, and shall be deemed to have surrendered all right, claim and interest in and to such proceeds. The order must contain a direction that a copy of the notice must be served on each of the persons named in the order, if within the state, in the manner prescribed for the service of a

summons on a defendant in an action in the supreme court, at least twenty days before the time specified in the notice. The publication of such notice, as required by said order, is hereby made and shall be deemed and taken for all purposes to be due and complete service upon each and every of such unknown heirs or their representatives, and the known heirs, their next of kin, and representatives, *and all persons interested* in such proceeds, of due notice of the proceeding to distribute and pay out such proceeds, *and shall be conclusive upon each and all of them.* Proof of such personal service may be made by the affidavit of the person making the same, and proof of the publication of such notice may be made by affidavit of the publisher of such paper or papers. At the time and place specified in the said order and notice, such unknown heirs or their representatives, and all known heirs, their next of kin, representatives or distributees, devisees, *and all persons interested in such proceeds*, shall appear in court, in person or by attorney, and make proof establishing their heirship and identity, kinship and interest in such proceeds, and upon proof being made to the satisfaction of the court of the heirship and identity of the unknown heirs, the proceeding for distribution shall be dismissed. And if such unknown heirs or their representatives do not so appear in court at the time and place specified in such notice and order, to establish their heirship and identity, kinship or interest, they and each of them, and every person claiming under or through them, shall thereafter be forever barred of and from all and every cause or causes of action for such proceeds, or on account thereof, or growing out of the distribution of such proceeds, and of and from all right, title, claim and interest in and to such proceeds, and shall be deemed to have surrendered all right, claim and interest in and to such proceeds. And upon proofs being made of such publication, and showing to the satisfaction of the court that such unknown heirs or their representatives cannot be found, or are dead, the said court shall have power to decree accordingly, and to decree that the share or interest of such unknown heirs in such real property was vested, at the time of such sale, in the known heirs of the ancestor from whom such unknown heirs derived title thereto, and to decree that the unclaimed portion of such proceeds was vested at the time of such payment in such known heirs, and that such heirs, their heirs, next of kin, representatives, distributees, devisees and assigns, are entitled thereto; and the said court shall make an order in such action, directing the payment to them, or their assigns, of the respective shares or portions of, or interest in such proceeds to which they are entitled; and which order shall be entered in the office of

the clerk of the county where the original action was brought, and after having been so entered for three months, shall be conclusive evidence of the regularity of the proceedings upon which it is based, and of all the facts set forth therein; and, upon serving upon the county treasurer a certified copy of such order, the treasurer shall so pay over and distribute such proceeds, after deducting his lawful commissions, and shall thereupon be exempt from all liability on account thereof; and if any such proceeds shall have been paid over by any county treasurer to the treasurer of the state of New York, under the provisions of section 753 of this act, due notice of said applications and proceedings shall be given to the comptroller of the state of New York, and the said proceeds shall be paid out by the treasurer of the state of New York, as provided by sections 751 and 753 of this act, and upon such payment he shall thereupon be exempt from all liability on account thereof.

CODE CIVIL PROCEDURE.

SECT. 1541. *Provision where a Party is Unknown.* — Where a defendant having a share or interest in the property is unknown, or where his name or part of his name is unknown, and the summons is served upon him by publication, or without the state, pursuant to an order for that purpose, as prescribed in article second of title first of chapter fifth of this act, the notice subjoined to the copy of the summons as published, or served therewith, must, in addition to the matters required in that article, state briefly the object of the action, and contain a brief description of the property.

* SECT. 438. *Cases in which Service of Summons by Publication, etc., may be ordered.* — An order directing the service of a summons upon a defendant, without the state, or by publication, may be made in either of the following cases.

1. Where the defendant to be served is a foreign corporation; or, being a natural person, is not a resident of the state; or where, after diligent inquiry, the defendant remains unknown to the plaintiff, or the plaintiff is unable to ascertain whether the defendant is or is not a resident of the state.

5. Where the complaint demands judgment, that the defendant be excluded from a vested or contingent interest in, or lien upon, specific real or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined or limited; or otherwise affecting the title to such property.

---

* As amended in 1879 and 1884.

When a copy of the summons is required by subdivision first or subdivision second of section 426 of this act, or by section 429 of this act, to be delivered to a person other than the defendant, an order directing the service of a copy of the summons upon such person without the state, or by publication, may be made as prescribed in this section, as if such person was the defendant in the action, and upon a verified complaint and the same proof with respect to such person, as is required in the next succeeding section with respect to a defendant. And sections 440 to 444 both inclusive, apply to the proceedings in like manner as if such person was a defendant.

SECT. 2518. *Persons constituting a Class; when to be cited; Citation when Some are Unknown.* — Where it is prescribed, in any provision of this chapter, that a petitioner must pray that a person, or that creditors, next of kin, legatees, heirs, devisees, or other persons constituting a class, may be cited for any purpose, all those persons are necessary parties to the special proceeding. Where persons to be cited constitute a class, the petitioner must set forth, in an affidavit, the name of each of them, unless the name, or part of the name, of one or more of them cannot, after diligent inquiry, be ascertained by him; in which case, that fact must be set forth, and the surrogate must, thereupon, inquire into the matter. For the purpose of the inquiry, he may, in his discretion, issue a subpœna, requiring any person to attend before him to testify respecting the matter. If he is satisfied, upon the allegations of the petitioner, or after making the inquiry, that the name of one or more of the persons to be cited, cannot be ascertained with reasonable diligence, the *citation may be directed* to that person or those persons, *by a general designation, showing his, her, or their connection with the decedent, or interest in the property or matter in question; or otherwise sufficiently identifying the person or persons intended.* A citation, thus directed, has the same force and effect, as if it was directed to the person or persons intended, by their names; and where the person or persons so intended are duly cited, in any manner prescribed by law, the decree binds them, as if they were named therein. A petition, duly verified, is deemed an affidavit, within the meaning of this section.

SECT. 2523. *Service by Publication upon Persons Unknown, etc.* — The surrogate may also make an order, directing the service of a citation without the state, or by publication, in either of the following cases:

1. Upon a party to whom a citation is directed, either by his full name or part of his name, where the surrogate is satisfied, by

affidavit, that the residence of that party cannot, after diligent inquiry, be ascertained by the petitioner.

2. Upon one or more unknown creditors, next of kin, legatees, heirs, devisees, or other persons included in a class, to whom a citation has been directed, designating them *by a general description*, as prescribed in this article.

* SECT. 1979. *When Unknown Claimants may be made Defendants.* — If the property is not occupied, and no person is known to the attorney general as claiming title thereto, the defendant or defendants may be designated as "*unknown claimants*" without any other description. In all other respects, section 451 of this act applies to an action, in which the defendant or defendants are thus designated.

## NORTH CAROLINA.

### STATUTES OF 1887.

[Chapter 284.†]

SECT. 1. That section 1892, of chapter 47 of the Code be amended by adding to the end thereof the following, to wit, "If it be made to appear to the court by affidavit or otherwise that there are any person or persons interested in the premises whose names are unknown to, and cannot after due diligence be ascertained by the petitioner or petitioners, the court shall order notices to be given to all such persons by publication of the petition or of the substance thereof with the order of the court thereon in one or more newspapers to be designated in the order. If after *such general notice by publication* any person interested in the premises and entitled to notice fails to appear the court shall in its discretion appoint some disinterested person or persons to represent the owners of any shares in the property to be divided, the ownership of which is unknown and unrepresented."

2. That section 1894 of said chapter be amended by adding at the end thereof the following: "If there be any of the tenants in common whose names are not known or whose title is in dispute the share or shares of such persons shall be set off together as one parcel."

3. That section 1908 of said chapter be amended by inserting after the word "state" in line four the words "or when the name of any tenant in common is not known."

---

* Relating to proceedings to establish an escheat.

† Relating to partition proceedings.

## OHIO.

2 BATES' ANNOTATED OHIO STATUTES.

SECT. 5053. *Proceedings when Residence of Heir or Devisee is Unknown.* — When an heir or a devisee of a deceased person is a necessary party, and it appears by affidavit that his name and residence are unknown to the plaintiff, proceedings against him may be had without naming him, and the court, or a judge, thereof, shall make an order respecting the publication of notice, and the order shall require not less than six weeks' publication.

See Sullivant *v.* Weaver, 10 Ohio St. 275.

SECT. 6416. *Petition for Appropriation, and in what Court to be filed.* — In any case the corporation may file with the probate judge a petition, verified as in a civil action, containing a specific description of each parcel of property, interest, or right, within the county, sought to be appropriated. The work, if any, intended to be constructed thereon, the use to which the same is to be applied, the necessity for the appropriation, the name of the owner of each parcel, if known, or if not known, a statement of that fact, the names of all persons having or claiming an interest, legal or equitable, in the property, so far as the same can be ascertained, and a prayer for the appropriation of the property.

SECT. 6419. *Service by Publication.* — When a person having an interest is unknown, or his residence is beyond the state, or unknown, the corporation may make service by publication against him, by publishing in a newspaper of general circulation in the county where the petition is filed for four consecutive weeks, a notice containing a summary statement of the objects and prayer of the petition, so far as it relates to the property of the person thus to be notified, the court in which it is filed, and the time when such person is to appear thereto, not less than ten nor more than twenty days after the last publication; and the fact of publication may be proved by the affidavit of any person knowing the same.

## OREGON.

1 HILLS' ANNOTATED LAWS OF OREGON (2D ED.).

* SECT. 426. The summons shall be directed by name to all the tenants in common who are known, and in the same manner to all lien creditors who are made parties to the suit, *and generally to*

* Relating to partition proceedings.

*all persons unknown having or claiming an interest or estate in the property.*

Sect. 427. If a party, having a share or interest in or lien upon the property be unknown, or either of the known parties reside out of the state or cannot be found therein, and such fact be made to appear by affidavit, the summons may be served upon such absent or unknown party by publication, directed by the court or judge, as in ordinary cases. When service of the summons is made by publication, it must be accompanied by a brief description of the property which is the subject of the suit.

Sect. 432. The court may confirm or set aside the report in whole or in part, and if necessary appoint new referees. Upon the report being confirmed, a decree shall be given that such partition be effectual forever, which decree shall be binding and conclusive, —

1. On all parties named therein, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee, or as tenants for life or for years, or as entitled to the reversion, remainder, or inheritance of such property or any part thereof after the termination of a particular estate therein, or who by any contingency may be entitled to a beneficial interest in the property, or who have any interest in any undivided share thereof as tenants for years or for life;

2. On all persons interested in the property who may be unknown, to whom notice shall have been given of the application for partition by publication, as directed by section 427; and

3. On all other persons claiming from such party or persons or either of them.

## PENNSYLVANIA.

2 Brightly's & Purdon's Digest.

[Page 1639.]

Sect. 5. The courts of common pleas of the different counties in this Commonwealth, are hereby authorized to issue writs of partition in all cases (l) in which partition is demanded, of lands, tenements or hereditaments in this Commonwealth, owned and held in joint tenancy, coparcenary or in common (m) and whether the demandant or defendants be minors or of full age; and where a minor or minors is or are the defendant or defendants in any action of partition, the writ shall be served upon his, her or their guardian or guardians, or if he or she have no guardian, then upon a guardian to be appointed for this purpose by the court, or notice thereof given in the manner hereinafter directed. And upon appearance of the parties, or on default being made, (n) the court shall pro-

ceed to examine the plaintiff's title, and quantity of his part or purpart, and accordingly as they shall find his right or purpart to be, they shall give judgment, and award a writ to make partition, whereby such proportion or purpart shall be set out in severalty; (o) which writ being executed, after ten days public notice, and the inquest of partition being returned and final judgment thereupon entered, the same shall be good, *and shall conclude all persons whomsoever*, in the same manner as though the party were under no disability of age or otherwise, *and notwithstanding all persons concerned are not named in the proceedings*, nor the title of the defendants truly set forth. (p)

[Page 1641.]

SECT. 16. In all actions of partition that may hereafter be commenced in any court of this Commonwealth, all the parties in interest shall be named in the writ, declaration and notices, when known; but if it shall appear, on oath or affirmation, that the names or residence of any of the parties are unknown to the plaintiff or plaintiffs in such action, the court shall have power to direct notice to be given to such parties by publication in one or more newspapers, *describing the parties as far as practicable*, as shall appear to the court reasonable and proper; *and the proceedings shall be as effectual, to all intents and purposes, as if all the parties had been named in the proceedings.*

1 BRIGHTLY'S & PURDON'S DIGEST.

[Page 606.]

SECT. 185. In the proceedings for the partition and valuation of an intestate's real estate, the parties in interest (d) shall be named in the petition, decree and notices, when known; (e) but if it shall appear, on oath or affirmation, that the names or residence of any of the parties are unknown to the applicant for the partition, the orphans' court shall have power to direct such notices to be given to such parties by publication in the public newspapers, *describing the parties as far as practicable*, as shall appear to the court to be reasonable and proper; *and the proceedings shall be as effectual, to all intents and purposes, as if all the parties had been named in the proceedings.*

3 PEPPER AND LEWIS' DIGEST.

*Supplement [1894 to 1897].*

[Page 504.]

DISCHARGE OF INCUMBRANCES

8. *Proceedings to discharge Encumbrance due and unclaimed for Twenty-one Years.* — In all cases in which, under any proceeding

in any court of record of this Commonwealth, or under any deed, last will and testament, mortgage, dower, recognizance, judgment, decree or other obligation or instrument, any money has been or may hereafter be charged upon land, payable presently or at a future time, and the period of twenty-one years has elapsed or shall have elapsed after the principal of such encumbrance or charge has become or shall have become due and payable, and no payment has been or shall have been made within said period of twenty-one years on account of such encumbrance or charge by the owner or owners of the land sought to be released and discharged, and no sufficient release, acquittance or acknowledgment of payment of such encumbrance or charge is of record in the county in which the land is situated, it shall be lawful for the orphans' court of the county in which such land is situated, in cases in which the encumbrance or charge is under a decree of an orphans' court, or by last will and testament, dower or recognizance charged by said court, and for the common pleas court of the county in which such land is situated in all other cases, upon petition of the owner or owners of the land, or any part thereof, subject to the encumbrance or charge, setting forth the facts, verified by affidavit, and alleging that no payment of principal or interest has been made within said period of twenty-one years on account of said encumbrance or charge by the present owner or owners, or so far as can be ascertained by his or their predecessors in title, and giving the names of all known parties interested in such encumbrance or charge, their places of residence, if known, and a description of the land subject to the charge and sought to be released and discharged, to direct the sheriff of the county to give notice to all such known parties in the county, whose residences are known, by copy served personally or left at their places of abode, and to all parties out of the county, if any, *and to all unknown parties*, if any, by public notice published in one or more newspapers published within or nearest the county once a week for four successive weeks, which notice shall briefly state the facts set forth in the petition and require the parties to appear in court on a day designated at least thirty days after the filing of the petition and service of notice as aforesaid to be made at least twenty days prior to the day designated for appearance, at which time, should any person or persons appear and claim payment for or on account of such encumbrance or charge or any part thereof, the court shall enter a rule on the person or persons so appearing and claiming to commence proper legal proceedings to enforce payment of their claim or claims within thirty days after the entry of such rule, and in default of compliance with such rule or in the event of a non-appearance of any person to answer the petition or in the event of the joinder

of all parties in interest in such petition, *the court* being satisfied of the truth of the allegations of the petition *shall decree* and direct *that the land subject to the encumbrance* or charge or any part thereof to be released or discharged *shall be released and discharged from the same*, and the payment thereof, and that a copy of the petition and decree shall be entered of record in the office of the recorder of deeds of the county, for recording which he shall be entitled to a fee at the rate he is entitled by law to charge for recording deeds, *which decree and record shall* forever thereafter *operate as a release* and discharge *of the land from the encumbrance* of the charge and shall bar all actions brought thereon.

[Page 506.]

12. *Proceedings to discharge Dower due when Owner cannot be found.* — That in all cases where any dower, legacy or other charge upon land, or any part thereof, is due and payable and where the person or persons to whom such dower, legacy or other charge upon land or any part thereof is due and payable cannot be found after diligent and reasonable research, it shall be lawful for the owner or owners of the lands bound by such dower, legacy or other charge upon land or any part thereof, to apply by petition to the orphans' court of any county wherein said lands are situate, setting forth the premises, and also the name or names of the person or persons to whom said dower, legacy or other charge upon land or any part thereof is due and payable if known, and if unknown, then stating that fact, as well as the time when said dower, legacy, charge upon land or any part thereof becomes due and payable. Whereupon the court shall direct the sheriff of said county to give public notice of the facts set forth in said petition, by publication for three successive weeks prior to the first day of the term of court next succeeding the term at which said petition was presented, in at least one nor more than three newspapers published within or nearest said county *requiring the person or persons to whom the money or moneys arising therefrom from said dower, legacy or other charge upon land, or any part thereof, is due and payable*, or wishes to lay claim to the moneys as aforesaid, to appear before said court at the term of said court next succeeding the term in which the petition was presented as aforesaid, and show cause why the money or moneys arising therefrom *sic* said dower, legacy or other charge upon land, or any part thereof, as set forth in said petition, should not be paid into said court; and in the event of the non-appearance of any person or persons to show cause, as aforesaid, or in the event of the appearance of any person or persons claiming the moneys as set forth in said petition,

but who fail to show to said court that they (the persons thus claiming) are entitled thereto, the said *court*, being satisfied of the truth of the facts set forth in said petition, *are* hereby *authorized*, empowered and required *to enter a decree that the moneys due and payable*, as aforesaid, together with interest thereon from the time that said dower, legacy or other charges upon land, or any part thereof, became due and payable, to the time of final decree, *be paid into said court;* and upon the payment of the costs, said decree shall be certified by the clerk of said court to the recorder of deeds of said county, whose duty it shall be, upon being paid therefor, to record said decree, indexing it in the name or names of the petitioner or petitioners as grantee or grantees, *and thereupon said dower*, legacy or other charge upon land or any part thereof which has been paid into said court as aforesaid, *shall be satisfied, extinguished and released*, and all action thereon forever barred; provided, that when the amount of such dower, legacy or other charge upon land does not appear as a matter of record, the court may by the appointment of an auditor or investigation in open court, ascertain and fix the amount so alleged to be due.

## RHODE ISLAND.

GENERAL STATUTES, 1896.

[Chapter 265.]

SECT. 8. In suits at law or in equity for partition of real estate, in which it may be alleged or may appear that any party or person interested therein, not a party plaintiff, is not a resident of the state, or where it is alleged or may appear that any person interested has left the state and it is not known where he is or whether alive or dead, and if dead, whether leaving children or not, or that some person unknown to the plaintiff is interested therein, the court before whom the suit is pending may order notice to be given to any such party or person, by ordering a copy of their order to be published in some newspaper published in this state for such length of time as they may deem proper, and may also in their discretion order letters, post-paid and directed to such party or person, to be deposited in the post office; and where notice is given as ordered by the court, they may proceed and render judgment in such suit in the same manner and with the same effect as if such party or person had received actual or personal notice or had appeared and answered to the suit.

SECT. 16. In suits in equity for partition, the appellate division of the supreme court may, in their discretion upon motion of any party to such suits, order the whole premises sought to be

divided, or any particular lot, portion or tract thereof, or the interest of the plaintiff or plaintiffs or of the defendant or defendants in the whole premises, or in any particular lot, portion or tract thereof to be sold at public auction, under the direction of the court, by the commissioners appointed to divide the same.

SECT. 17. No person interested in the estate and not a party to the suit shall be bound by such sale, but the court may, upon motion, proceed to make all persons interested in such estate parties thereto, though non-resident, absent or unknown, in the manner hereinbefore provided; in which case, if the whole of their shares of the estate be ordered to be sold, such decree shall forever thereafter, in favor of the purchaser of such estate or shares, and of those claiming under or by virtue of him, be binding upon such non-resident, absent or unknown person although not appearing to such suit.

SECT. 24. In actions at law for partition any party aggrieved by any direction or ruling of the common pleas division of the supreme court, or by the decision of said division, or verdict of the jury, if any, on which a judgment that partition shall be made may be entered, may prefer his petition to the appellate division of the supreme court for a new trial, in the manner prescribed in section five and following sections of chapter 251; but if no such petition shall be preferred, such judgment shall be final, and said common pleas division thereupon, on the motion of the plaintiff in such writ of partition, shall appoint and commission, at its discretion, one or more discreet, impartial and disinterested persons to make partition pursuant to such judgment, who shall be sworn to the faithful discharge of their trust.

SECT. 25. The persons so appointed, first giving reasonable notice to the respective parties, shall make partition between them according to their several rights, as ascertained by the judgment of the court ordering such partition.

SECT. 26. In case non-resident, absent or unknown parties or persons be interested in such partition, and whether the commission to make partition issue at law or in equity, the court issuing the same shall order such notice to be given to such parties or persons interested, by the commissioners appointed to make partition, as such court shall judge proper, and the same, when given, shall for all purposes be as effectual as personal notice.

## SOUTH CAROLINA.

1 REVISED STATUTES, 1893.

SECT. 2438. Each of the Escheators, as hereinbefore provided for, in every case where he has knowledge or belief, or information

from another, that certain lands in his County have escheated to the state by the death of the person seized in fee simple, either in law or in fact, without leaving any person who can lawfully claim such lands, either by purchase or descent, from such former proprietor, shall, on such knowledge or information, or the order of any court of record, issue his notification of such supposed escheated lands to one of the judges of the circuit court, at least two months previous to the next session of the said court to be held in the county where such lands lie.

Sect. 2439. The judge presiding at such court shall cause the jury (being first duly sworn) to proceed and make a true inquest of all such supposed escheated lands, which by the escheator shall be subjected to their investigation, and a true verdict make thereon; whereupon the judge shall certify the same, under his hand and the seal of the court, to the escheator, who must record the same in a book to be kept for that purpose, and return the original within two months after date thereof into the office of the clerk of the said court, to be there filed and kept as a record thereof.

Sect. 2440. Upon the return of the inquest into his office, the said clerk shall thereupon cause to be advertised in a newspaper of the county, or other nearest gazette, the first week in every month, for six months, a notice containing a particular description of the lands, the name of the person last seized, and the supposed time of his or her death, together with the part of the world in which he or she was supposed to have been born, *and requiring his or her heirs, or others claiming under him or her*, to *appear and make claim*.

Sect. 2444. If any person shall appear within five years and make good title to such lands in the court of common pleas, on an issue tried, he shall forthwith receive adequate compensation.

## SOUTH DAKOTA.

### Annotated Statutes, 1899.

Sect. 6696. *Power of Court.* — That in all actions arising under chapter twenty-nine,* of the code of civil procedure, of this state, and in actions brought for the satisfaction of record of mortgages and other liens upon real property, whenever the defendant is not found within the jurisdiction of the court and service of summons therein is made on such defendant by publication, or whenever any defendant in such action refuses or neglects to make a conveyance or cancel an incumbrance pursuant to the judgment of the court, *the court shall have power by its judgment*

* Actions to determine conflicting claims to real property.

*to determine and establish the title to the property in question*, to annul, cancel and remove any and all conveyances and incumbrances constituting a cloud upon such title, and whenever a conveyance of such property is directed to be made by such judgment, and likewise in actions for the specific performance of contracts relating to real property in this state, whenever the defendant is not found within the jurisdiction of the court and service of summons therein is made on such defendant by publication, or whenever any defendant in such action refuses or neglects to convey the property involved in the suit pursuant to the judgment of the court, this shall be done in behalf of such defendant by a trustee appointed by the court for that purpose.

* Sect. 6598. *Service by Publication.* — If the party having a share or interest be unknown or any one of the unknown parties reside out of the state, or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication as in other cases. When publication is made, the summons, as published, must be accompanied by a brief description of the property, which is the subject of the action.

Sect. 6607. *Judgment on Report; Effect.* — The court may confirm, change, modify or set aside, the report, and if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive.

2. On all persons interested in the property, who may be unknown, to whom notice has been given in the action for partition by publication.

## TENNESSEE.

### Code of 1896.

Sect. 3826. *Duty of District Attorney.* — It shall be the duty of the district attorney, in all cases in which he has a good right to believe an escheat has occurred in his district, to file a bill in the chancery court of the county wherein the land so escheated may lie, in the name of the state of Tennessee, and without security, to have the same declared escheated.

Sect. 3828. *Publication to Unknown Heirs; Appearance and Defence.* — In addition to the foregoing named defendants, under said bill, there shall be a publication made for thirty days in a newspaper published in the county in which the bill is filed, or, if no newspaper be published in the county, then the nearest news-

* Relating to partition proceedings.

paper so published, *calling upon unknown heirs of such deceased person, and all persons claiming under him or her*, in any manner or way, whatever, to enter his, her, or their appearance as defendants to said bill or suit, and all persons having an interest in the same may come into court and defend the same according to the rules of said court.

* Sect. 5018. *Contents of Bill or Petition.* — The bill or petition shall set forth, as far as known, the names of the owners, their residences, which of them are infants or married women, and to whom married; describe the property, its situation, the title by which it is held and possessed, and such other facts as may be deemed necessary, and pray the court to cause it to be divided among the claimants, according to their respective rights and titles.

Sect. 5019. *Parties.* — Every person having such interest, whether in possession or otherwise, and every person entitled to dower, if the same has not been allotted, shall be made a party.

Sect. 5020. *Parties Unknown, Interests Contingent, etc.* — In case any one or more of such parties, or the share or quantity of interest of any of the parties, be unknown to the petitioner, or be uncertain or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be a contingent remainder, so that such parties cannot be named, the facts shall be set forth in such petition.

Sect. 5021. *Notice.* — Notice of this petition, stating the time it is intended to present it, and the court at which it is to be presented, shall be served upon the parties who do not join in the petition, at least five days before its presentation, or given by publication, as hereinafter provided.

Sect. 5023. *Publication.* — If any of the parties defendant are non-residents or unknown, or of unknown residence, the court, or its clerk, may order and make publication for them, under the provisions of this code in like cases in chancery where personal service of process is dispensed with.

Sect. 5040. *Upon whom Conclusive.* — The partition thus made is conclusive:

1. On all parties named in the proceedings who have at the time any interest in the premises divided, as owners in fee or as tenants for years or as entitled to the reversion, remainder, or inheritance of such premises after the termination of any particular estate therein; or who by any contingency in any will, conveyance, or otherwise, may be or may become entitled to any beneficial interest

* Relating to partition proceedings.

in the premises; or who shall have any interest in any individual share of the premises, as tenants for years, for life, by the curtesy, or in dower.

2. On all persons interested in the premises who are unknown, to whom notice has been given by publication, as hereinbefore directed.

3. On all persons claiming from such parties or persons or either of them.

## TEXAS.

### Revised Statutes, 1895.

Art. 1821. If any person die seized of any real, or possessed of any personal estate, without any devise thereof, and having no heirs, or where the owner of any real or personal estate shall be absent for the term of seven years, and is not known to exist, such estate shall escheat to and vest in the state; provided, that where no will is recorded or probated in the county where such property is situated within seven years after the death of the owner, it shall be prima facie evidence that there was no will, and, where no lawful claim is asserted to, or lawful acts of ownership exercised in such property for the period of seven years, and this has been proved to the satisfaction of the court, it shall be deemed prima facie evidence of the death of the owner and of the failure of heirs, and the court trying the cause may, if such evidence is not rebutted, find therefrom in favor of the state.

Art. 1822. When the district or county attorney shall be informed or have reason to believe that an executor under the will of any person who has died without heirs and without having devised his estate, has not accepted the trust, and that no administrator with the will annexed has been appointed; or where such attorney shall discover that no letters of administration on the estate of an intestate who has died without heirs have been granted; or where such attorney finds any estate, real or personal, in the condition specified in the next preceding article (1821) he shall file a petition in behalf of the state in the district court of the county where such property or any part thereof lies, which petition shall set forth a description of the estate, the name of the person last lawfully seized or possessed of the same, the names of the tenants or persons in actual possession, if any, and the names of the persons claiming the estate, if any such are known to claim, and the facts or circumstances in consequence of which such estate is claimed to have escheated, praying for a writ of possession for the same in behalf of the state.

Art. 1823. The clerk of the court shall issue citation, as in

other civil causes, for such of the defendants as shall be alleged in the petition to hold possession of or claim such estate, requiring them to appear and answer at the next term of court.

ART. 1824. The clerk shall also issue a citation, setting forth briefly the contents of the petition, *for all persons interested in the estate to appear and answer* at the next term of court, which citation shall be published as required in other civil suits.

ART. 1825. All persons named in such petition as tenants or persons in actual possession or claimants of the estate may appear and plead to such proceedings, and may traverse the facts stated in the petition, or the title of the state to the lands and tenements therein mentioned, as in civil cases, and any other person claiming an interest in such estate may appear and be made a defendant and plead as in other cases.

ART. 1826. If no person, after notice as aforesaid, shall appear and plead within the time prescribed by law, then judgment shall be rendered by default in behalf of the state.

ART. 1827. If any person appear and deny the title set up by the state, or traverse any material fact in the petition, issue shall be made up and tried as other issues of facts; and a survey may be ordered, as in other cases where the titles or boundaries of land are drawn in question.

ART. 1828. If after the issue and trial it appears from the facts found or admitted that the state has good title to the estate, real or personal, in the petition mentioned, or any part thereof, *judgment shall be rendered that the state shall be seized or possessed thereof*, and at the discretion of the court recover costs against the defendants; provided, that whenever judgment is rendered in favor of the state, whether by default or after trial upon its merits, a writ of possession shall be awarded as in other civil suits.

ART. 1829. If it appears that the state has no title in such estate the defendant shall recover his costs, to be taxed and certified by the clerk; and the comptroller of public accounts shall, on such certificate being filed in his office, issue a warrant therefor on the treasury, which shall be paid as other demands on the treasury.

ART. 1830. When any judgment shall be rendered that the state be seized or possessed of any estate, *such judgment* shall contain a description thereof, and *shall vest the title in the state.*

## VERMONT.

STATUTES, 1894.

[Chapter 125.]

SECT. 2549. When a person dies intestate, seized of real or personal property in this state, leaving no heir or person by law entitled to the same, the selectmen of the town where the deceased last resided, if he was an inhabitant of the state, or of the town in which he had estate, if he resided out of the state, may, in behalf of the town, file a petition with the probate court of the same district for an inquisition in the premises; and the probate court shall thereupon appoint a time and place of hearing and deciding on such petition, and cause a notice thereof to be published in some newspaper printed in the state of which the deceased was last an inhabitant, if within the United States; if not, in some newspaper printed in this state.

SECT. 2550. The notice shall recite the substance of the facts and request set forth in the petition, and the time and place at which persons claiming the estate may appear and be heard before the court, and shall be published at least six weeks successively, the last of which publications shall be at least six months before the time appointed by the court for making the inquisition.

SECT. 2551. If no sufficient cause is shown to the contrary, at the time appointed for that purpose, the court shall order and decree, that the estate of the deceased in the state, after the payment of just debts and charges, shall escheat; and shall assign the personal estate to the town where he was last an inhabitant in the state, and the real estate to the towns in which the same is situated. If he was never an inhabitant of the state, the whole estate shall be assigned to the towns where the same is located. Such estate shall be for the use of schools in the towns respectively, and shall be managed and disposed of like other property appropriated to the use of schools.

## VIRGINIA.

CODE, 1887.

SECT. 2400. *Recovery by State of Property Derelict.* — The residuum of a decedent's estate, belonging to the Commonwealth, and any property derelict, or having no rightful owner, may be recovered from any person in possession thereof by a bill in equity in the name of the Commonwealth.

SECT. 2401. *Publication of Suit; what to state and require.* — When any such suit is instituted, the court shall cause a publication to be made for three months in some newspaper printed in the

city of Richmond and in the city of Washington, setting forth the nature of the claim, the name and nativity (where known) of the deceased person, or of the former owner of the property, if known, as the case may be, and describing the property or estate, and *requiring all persons claiming an interest therein* to appear and make themselves defendants by a given day of an ensuing term.

Sect. 2402. *Decree of the Court.* — If no person appear and show title in himself, the court shall decree the residuum or other property to the Commonwealth, and enforce the collection thereof, or of the proceeds of the sale of such property.

## WASHINGTON.

### Ballinger's Annotated Codes and Statutes.

Sect. 5557. *Who may bring Actions for.* — When several persons hold and are in possession of real property as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, an action may be maintained by one or more of such persons for a partition thereof, according to the respective rights of the persons interested therein, and for sale of such property, or a part of it, if it appear that a partition cannot be made without prejudice to the owners.

Sect. 5558. *All Known Interest must be stated in Complaint.* — The interest of all persons in the property shall be set forth in the complaint specifically and particularly, as far as known to the plaintiff, and if one or more of the parties, or the share or quantity of interest of any of the parties be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact shall be set forth in the complaint.

Sect. 5560. *Notice.* — The notice shall be directed by name to all the tenants in common who are known, and in the same manner to all lien creditors who are made parties to the suit, *and generally to all persons unknown having or claiming an interest or estate in the property.*

Sect. 5561. *Service by Publication.* — If a party having a share or interest in or lien upon the property be unknown, or either of the known parties reside out of the state, or cannot be found therein, and such fact be made to appear by affidavit, the notice may be served by publication, as in ordinary cases. When service is made by publication, the notice must contain a brief description of the property which is the subject of the suit.

Sect. 5066. *Report of Referees; Confirmation; Decree.* — The

court may confirm or set aside the report in whole or in part, and if necessary, appoint new referees. Upon the report being confirmed, a decree shall be entered that such partition be effectual forever, which decree shall be binding and conclusive, —

1. On all parties named therein, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee, or as tenants for life or for years, or as entitled to the reversion, remainder, or inheritance of such property, or any part thereof, after the termination of a particular estate therein, or who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life;

2. On all persons interested in the property, to whom notice shall have been given by publication;

3. On all other persons claiming from or through such parties or persons, or either of them.

## WEST VIRGINIA.

CODE, 1891 (3D ED.).

[Chapter 79.]

SECT. 1. *Partition of Lands.* — Tenants in common, joint tenants and coparceners, shall be compellable to make partition, and the circuit court of the county wherein the estate, or any part thereof, may be, shall have jurisdiction, in cases of partition, and in the exercise of such jurisdiction, may take cognizance of all questions of law affecting the legal title, that may arise in any proceedings.

SECT. 4. If the name or share of any person interested in the subject of the partition be unknown, so much as is known in relation thereto shall be stated in the bill.

[Chapter 124.]

SECT. 11. On affidavit that a defendant is not a resident of this state, or that diligence has been used by or on behalf of the plaintiff to ascertain in what county he is, without effect; or that process, directed to the officer of the county in which he resides or is, has been twice delivered to such officer more than ten days before the return day, and been returned without being executed; or that the defendant is a corporation, and that no person can be found in the county upon whom the process can be legally served, an order of publication may be entered against such defendant. And in any suit in equity, where the bill states that the names of any persons interested in the subject to be divided or disposed of are

unknown, and make such persons defendants *by the general description of parties unknown*, on affidavit of the fact that the said names are unknown, an order of publication may be entered *against such unknown parties*. Any order under this section may be entered either in court or at the rules. In a proceeding by petition, there may be an order of publication in like manner as in a suit in equity.

Sect. 12. Every order of publication shall state briefly the object of the suit, and require the defendants against whom it was entered, or the unknown parties to appear within one month after the date of the first publication thereof and do what is necessary to protect their interests. It shall be published once a week for four successive weeks in some newspaper published in the county in which the order is made or directed, if one is so published, unless the circuit court of such county otherwise order; and if no newspaper be published in the county, then in such other newspaper as the court may prescribe; or if none is so prescribed, as the clerk may direct. It shall be deemed to have been duly published on the date of the fourth publication thereof. It shall also be posted at the front door of the court house of the county wherein the court is held, at least twenty days before judgment or decree is rendered.

[Chapter 42.]

Sect. 6. *Notice of the Application.** — Of such application ten days' notice shall be served on the said owners, claimants and persons holding liens, and the notice may be given either before the application is presented or afterwards. But where the owners of all or any part of the real estate proposed to be taken, or the persons holding such liens or conflicting claims, or any of them, are not in the county or are unknown to the applicant, the notice as to them, instead of being thus served, may be given by advertisement containing (by reference to a plat filed for the purpose in the office of the clerk of the circuit court or otherwise) a specific description of the property in which they are interested that is proposed to be taken, and stating the purpose to which it is intended to be appropriated, and the time and place at which a hearing will be asked for upon the said application, which advertisement must be published at least once a week for four weeks successively in some newspaper printed in the county; or if none be printed therein, then in some newspaper of general circulation in the county; and must also be posted at the front door of the court house of the county, four weeks at least before the hearing.

* In proceedings to take land by right of eminent domain.

SECT. 7. *Parties under Disability or Unknown.* — If an owner or person holding such lien or claim be under disability and there be a guardian or committee for him, such guardian or committee shall be notified; but if there be no guardian or committee or if any such owner or person be unknown, the court shall appoint a guardian ad litem to defend their respective interests, and may direct the expense of such guardian ad litem, including a reasonable docket fee, to be fixed by the court, but not to exceed twenty dollars, to be taxed in the costs and paid by the applicant.

## WISCONSIN.

SANBORN AND BERRYMAN'S ANNOTATION, 1898.

SECT. 3102. *Complaint; Parties.* — The complaint in such action shall particularly describe the lands sought to be partitioned and shall set forth the rights and titles of all persons interested therein, so far as the same are known to the plaintiff, including the interest of any tenant for years, for life, by the curtesy or in dower and of the persons and title to the reversion, remainder or inheritance, after the termination of any particular estate therein; and of every person who by any contingency, contained in any devise, grant or otherwise, or as having inchoate right of dower may be or become entitled to any beneficial interest in the premises; but in case any such person or his share or interest be unknown to the plaintiff, or be uncertain or contingent, or the ownership or the inheritance shall depend upon an executory devise, or the remainder shall be a contingent remainder, so that such person or his interest cannot be named or set forth, the same shall be stated in the complaint; but no person whose title or interest appears of record or who is in the actual possession or occupancy of any of such lands shall be considered or proceeded against as an unknown owner. The complaint shall demand judgment for a partition of the premises according to the respective rights of the parties interested therein and for a sale thereof, if it shall appear that partition of the land cannot be made without great prejudice to the owners thereof; and when the complaint does not pray partition of all the lands owned by the parties either of them may have the complaint so amended as to affect all the lands so owned. Every person having an interest as aforesaid, whether in possession or otherwise, and every person entitled to dower in such premises, if the same has not been admeasured, may be made a party to such action.

SECT. 3116. *Confirmation of Report; Judgment Conclusive.* — Notice of the application to confirm said report shall be given to

all the parties that have appeared, and upon confirmation thereof judgment shall be entered that the partition so ordered and made be firm and effectual forever, and such judgment shall be final and conclusive:

1. On all the parties to such action and their legal representatives, except as hereinbefore provided and as provided in the next section.

2. On all persons interested in the premises who may be unknown, who shall be served in such action as provided by law.

3. On all persons claiming or to claim from such parties or persons or either of them, subsequent to the filing of the notice of the pendency of the action.

A copy of such report and judgment, certified to be such in the manner required by law to make them evidence, shall be recorded in each county in which any part of the premises are situated, and the expense of such copy and record shall be taxed in the costs.

Sect. 3186. *Action to quiet Title, who may bring; Pleading; Evidence; Summons.* — Any person having the legal title to land may institute an action against any other person setting up a claim thereto, and if the plaintiff shall be able to substantiate his title the defendant shall be adjudged to release to him all claim to such land and pay the costs of such action, unless the defendant shall, by answer, disclaim all title to such land and give a release thereof to the plaintiff, in which case he shall recover costs, unless the court shall otherwise order. It shall be sufficient to aver in the complaint in such action the nature and extent of the plaintiff's estate in such land, describing it as accurately as may be, that he is in possession thereof or that said land is vacant and unoccupied, and that the defendant makes some claim thereto, and to demand judgment that the plaintiff's claim be established against any claim of the defendant, and that he be forever barred against having or claiming any right or title to the land adverse to the plaintiff; and the defendant, if he do not so disclaim and release, may answer any matter in denial of the plaintiff's claim, title or possession, or which, if proved, will establish his own, and judgment shall be rendered according to the rights of the parties. In all cases where it may be necessary for the plaintiff to offer proof that the defendant is setting up or making some claim to said land the introduction in evidence of any instrument in writing, theretofore at any time appearing of record, or of the record thereof or of a duly certified copy of such record, purporting to convey to or otherwise in any way to affect in favor of the defendant, or any grantor, devisor, ancestor or other assignor of the defendant said land or any interest therein adversely to the plaintiff, or under or through

which the plaintiff does not trace his claim of title, shall be sufficient proof of the making or setting up of such claim of title on the part of the defendant; and the court may, in any case, receive any other competent evidence tending to establish the fact of the making or setting up of claim on his part. *In any such action where a person* or persons *is* or are *made a party* by a fictitious name, or *as an unknown owner, heir, grantee, representative or other like designation* the plaintiff shall give in a note at the foot of the summons a brief description of the premises affected thereby. And any person not having such title or possession, but being the owner and holder of any lien or incumbrance on land, shall also have the same right of action as the owner in fee to test the legality and validity of any other claim, lien or incumbrance on such land or any part thereof.

SECT. 3196. *Action against Unknown Owner.* — In any action relative to real estate if any person who is a necessary or proper party thereto is unknown he may be proceeded against and made a party thereto *as an unknown owner*, and the summons may be served upon him as is provided by law for service of a summons upon unknown owners, but no person whose title or interest appears of record or who is in actual possession or occupancy of such real estate shall be considered or proceeded against as an unknown owner.

SECT. 2612. *Suing Party by Fictitious Name; Unknown Partners' Names.* — Where the plaintiff is ignorant of the name or a part of the name of any defendant, or when any person who may be a proper party defendant to an action to establish or enforce, redeem from or discharge a lien or claim to any real or personal property in this state as heir, grantee, legal representative or otherwise is unknown to the plaintiff, such defendant or person may be designated a defendant by so much of the name as is known, or by a fictitious name, *or as an unknown heir, representative, owner or person*, as the case may require, *adding such description as may reasonably indicate the person intended*, and such person shall be regarded a defendant in the action and as sufficiently described therein for all the purposes thereof, including service of the summons, as upon an absent defendant or otherwise, appointment of guardian, if an infant, and liability to be bound by the proceedings, orders and judgments therein. When the true name of the person of such defendant is ascertained the process, pleadings and all proceedings whatever may be amended by an order directing the insertion of the true name instead of the designation employed. In actions or proceedings against a partnership, where the names of the several members of the partnership are unknown

to the plaintiff, all proceedings may be in the partnership name until the names of the several partners are ascertained, whereupon the process, pleadings and all proceedings shall be amended by an order directing the insertion of such names, and the subsequent proceedings shall be therein.

Sect. 1197. *Actions, when barred.* — The grantee named in any deed made by a county clerk or the treasurer of any incorporated city or village on the sale of lands for the non-payment of taxes as provided by law, his heirs, executors, administrators or assigns may, at any time within three years after the date of such conveyance, commence an action against the person or persons owning the lands described in such conveyance at the time of making the sale upon which such conveyance was made, or any parcel thereof or interest therein or against any person or persons claiming under such owner or owners, for the purpose of barring such former owner or owners and those claiming under them of all right, title, interest or claim in such lands; but no such action shall be commenced on any such deed issued in lieu of a void, informal or insufficient deed unless the same be commenced within three years after the date of such void, informal or insufficient deed.

Sect. 1208. *Unknown Owners, Minors, Idiots, etc.* — If the plaintiff in such action * cannot ascertain who are the proper persons to make defendants as to any tract or parcel of land described in his complaint he may allege the fact in his complaint and they may be proceeded against as non-resident defendants *and shall be described in the proceedings as unknown owners;* but no judgment rendered against such unknown owners shall affect the right, title or interest of any minor, idiot or insane person whose right of redemption had not expired at the time of the commencement of such action.

## WYOMING.

### Revised Statutes, 1887.

Sect. 3009. *Who may obtain Sale.* — District courts in an action by the tenant in tail, or for life, or by the grantee or devisee of a qualified or conditional fee, or of any other qualified, conditional, or determinable interest, or by a person claiming under such tenant, grantee, or devisee, or by the trustees or beneficiaries, if the estate is held in trust, may authorize the sale of any estate, whether the same was created by will, deed or contract, or came by descent, when satisfied that a sale thereof would be for the benefit of the person holding the first and present estate,

* Actions under section 1197.

interest, or use, and do no substantial injury to the heirs in tail, or others in expectancy, succession, reversion, or remainder.

SECT. 3010. *Requisites of Petition; Parties.* — The petition shall contain a description of the estate to be sold, a clear statement of the interest of the plaintiff therein, and a copy of the will, deed, or other instrument of writing by which the estate is created, all persons in being who are interested in the estate, or who may, by the terms of the will, deed, or other instrument, creating the entailment or other estate, thereafter become interested therein as heir, reversioner, or otherwise, shall be made parties to the petition; and if the names of any persons who ought to be made parties are unknown to the plaintiff, or if the residence of any such party is unknown to the plaintiff, the fact shall be verified by the affidavit of the plaintiff, *and the sale may be ordered notwithstanding such names and residences are unknown.*